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CANADIAN LABOUR AND THE LAW

by

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THE UNIVERSITY OF ALBERTA

CANADIAN LABOUR AND THE LAW

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BY

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Synopsis

This thesis is an attempt to outline and evaluate certain aspects of constitutional, common and statute law as they relate to Canadian labour. My survey is by no means exhaustive and I have felt in dealing with almost every section that I have been somewhat more successful in stating important problems than in providing answers to them. I believe, however, that this work has some value as a "jumping off" point for my own further research in labour problems and that perhaps the facts and conclusions outlined here will be helpful background to the writer of a satisfactory text on Canadian labour relations.

The first chapter of this thesis deals with the constitutional problem as it relates to labour legislation in Canada. Although a satisfactory solution to these difficulties can come only when Canadians have finally devised an adequate procedure for amendment of the British North America Act or when the nation becomes involved in a major war, the situation is by no means as hopeless as some would have us believe. There are grounds for reasonable hopes that provincial unanimity may be possible for amendments dealing with very specific and limited transfers of legislative power to the Federal Parliament. In the second place, provincial jurisdiction over a broad field of labour legislation appears desirable and necessary.

The most unsatisfactory features of Canadian labour have evolved through the application of common law principles by the courts to various aspects of labour relations. I approach this second chapter with the humility of a layman but the fact that the law relating to the status of trade unions, collective agreements and picketing is incomprehensible to all but the expert is, by itself, an overwhelming argument for statutory clarification.

The final chapter of this thesis is a comparative survey of Federal and provincial collective bargaining legislation as it now exists. Outside of Prince Edward Island the situation is a relatively healthy one. Canadian legislators have, by and large, been agreed that the way to industrial peace lies in the encouragement of collective bargaining within the boundaries of such provisions as a pear necessary in the public interest rather than in compulsory arbitration. There seems no reason to believe that the various Governments will not continue to revise and refine their legislation with this end in view as they have in the past.

I wish to extend my thanks to the staff of the Calgary Law Library who have so generously allowed me the use of their facilities in my research, Mr. J. Cohen, B.A., LL. B. of Calgary was kind enough to answer several of my questions regarding picketing and the legal status of trade unions and I wish to thank him very much for putting the results of his experience as the legal representative for several unions at my disposal. Finally, I wish to express my appreciation to Prof. H.B. Mayo and Mr. T.F. Wise of the Department of Political Economy for introducing me to the problems surrounding labour relations in Canada.

Introduction

A. The Background of Canadian Labour Legislation

It is impossible to describe and evaluate intelligently the legal position of labour in Canada without at least a cursory survey of the geographic, economic, political and demographic structure within which labour legislation has been framed.

Geographic Aspects.

The outstanding geographic fact about Canada is its proximity to the United States and the effects of this proximity on the organized labour movement in Canada can scarcely be over-estimated. As early as 1860 four Canadian locals of the Iron Moulders' Union affiliated with a union of their American counterparts. In 1865 the International Typographical Union was formed with locals on both sides of the border. In the late 1860's and 1870's international railway unions were formed with the significant policy of remaining outside federations and congresses of workers in other trades, a policy which remains an important fact of the Canadian labour movement. In 1948 some 675,044 Canadian workers, 69.0 per cent of all union members, belonged to international unions which had their headquarters in the United States.¹ The activities of the internationals, along with the intimate cultural, social and economic ties between Canada and the United States, has had a vital, if somewhat undefinable, impact upon Canadian labour.

Almost inevitably, the Canadian labour movement has been affected by the tensions and schisms in the ranks of organized labour

1. Department of Labour Report on Labour Organization in Canada
King's Printer Ottawa - 1949-p.28

in the United States. The Trades and Labour Congress formed in 1883 remained aloof in the bitter rivalry between the American Federation of Labour and the Knights of Labour for many years. However, in 1902, the T.L.C. amended its constitution to exclude Knights of Labour unions. Similarly, the Congress could not escape the effects of the split between the American Federation of Labour and Committee on Industrial Organization unions which led to the expulsion of the latter in 1936. In Jan., 1939 the Congress expelled seven C.I.O.-affiliated unions, who in 1940 united with elements of the All-Canadian Congress of Labour to form the Canadian Congress of Labour.¹

The preponderance of American influence in the internationals has given rise to a reaction in the Canadian labour movement from time to time. The rise of the Canadian and Catholic Congress of Labour in Quebec has been a part of the broad strategy of the Roman Catholic Church to isolate its French-Canadian members from the secularist and "materialistic" aspects of North American civilization. The Canadian Federation of Labour, which was formed in 1902 from elements which had been expelled from the T.L.C., pursued for two decades a somewhat unsuccessful policy of organizing Canadian workers on a purely national basis. In 1923 the leaders of the Canadian Brotherhood of Railway Employees which had been expelled from the T.L.C. in 1921 on charges of dual unionism attempted to unite remnants of the almost defunct Canadian Federation of Labour and other unions into a national congress on an aggressive platform of opposition to the internationals. Apart from the Canadian and Catholic Congress of Labour, which in 1948 included

1. Most of the historical materials for this section are taken from Prof. H.A. Logan's Trade Unions in Canada - Macmillan 1948 and The Labour Movement in Canada - R.H. Coats - Canada and the Provinces Vo. IX - Edinburgh University Press - 1914-pp. 277 -355

40.7% of the organized workers in the Province of Quebec,¹ the movement to organize purely national congresses have had little success because of lack of funds to compete in organizational activities with the internationals, poor leadership, and the failure of a platform of shrill nationalism and aggressive opposition to American domination to appeal to the mass of Canadian workers.

Most large Canadian manufacturing firms are subsidiaries of American enterprises and thus follow the policies of their parent firms in their labour relations. The struggle of organized labour for industry-wide bargaining in the steel and automobile industries in Canada and the violent antagonisms of employers to these attempts are but facets of similar clashes in the United States. The integration of the Canadian and American economies is the most significant fact to be considered in any study of Canadian labour relations.

The second vital geographic fact affecting Canadian labour is the vastness of our nation. Obviously the great distances between urban centres imposes special difficulties on union organizational and co-operative activity among unions and the obstacles of distance are less easily surmounted than in the case of business. The size of our nation also reduces labour mobility and aggravates unemployment both in times of prosperity and depression. These effects have been somewhat mitigated by the fact that about half of our population and an even higher proportion of our secondary industry are concentrated in the St. Lawrence Valley - Niagara Peninsula area.

Economic Aspects.

Canada's natural resources are of a highly specialized nature. Therefore foreign trade is perhaps more important to us than to any other nation with the exception of Britain, and Canadian labour

1. Department of Labour Report on Labour Organization in Canada - 1949 p. 25

can ill-afford to be insular in its outlook or to believe that its interests can be secured through purely national action. The Canadian labour movement has taken a keen and active interest in the activities of the International Labour Organization since 1919 and in the international trade union movement.¹

It has become a truism that the modern trade union movement is a product of the industrial revolution. The grouping together of large numbers of workers in a single factory, the minute specialization of mass-production industry, and modern methods of transportation and communication have inter-acted to mould the pattern of twentieth century collective bargaining between large labour organizations representing workers in particular crafts, regions or industries and mammoth corporations or employers' associations. Under the impact of two world wars the economic nationalism, which has been a permanent factor in Canada almost since Confederation, and technological advance our nation has evolved an important industrial economy. Until the late 1930's labour organization in the new mass-production industries had been almost uniformly unsuccessful, largely because of the hostile attitude of T.L.C. leaders to organization on an industrial basis. The new C.C.L. unions have met the challenge and have been outstandingly successful in industries like rubber, automobile, steel and meat-packing. Industrialization has made the old-type craft union, with its accent on mutual benefit activities and standards of workmanship, relatively unimportant and has given place to craft unions almost exclusively interested in bettering working conditions and wages, "cognate" unions of members of related crafts and industrial unions.

1. The Congresses are active members of the International Confederation of Free Trade Unions which in 1949 broke away from the Communist-dominated World Federation of Trade Unions. Significantly the United Steelworkers' Union of Canada (a C.C.L. affiliate) is now engaged in a campaign to raise \$25,000 for the setting up of labour colleges in India. Labour's Own Colombo Plan - Saturday Night - May 1951.

In spite of industrialisation, primary, extractive industry still plays a major part in the Canadian economy and presents special problems to labour relations. In general, primary industry is usually carried on by small business units often widely separated and the problem of labour organization and the enforcement of collective bargaining and industrial standards legislation is difficult. Secondly, employment in extractive industries such as lumbering, agriculture and mining is often of a seasonal nature and a serious unemployment problem is thus created at different times of the year.

Political Aspects.

The political and constitutional structure of the Canadian nation has had a persistent influence on Canadian labour relations. The British North America Act as judicially interpreted confers competence over most matters directly involving labour relations upon the Legislatures of the Provinces.¹ Therefore labour must exert pressures for favourable legislation on all eleven governments. Provincial labour federations of international unions have assumed considerable importance in Canada. The fact that industrial standards, and, more particularly, collective bargaining legislation favourable to labour, were effected later in Canada than in most other democratic nations is in part a reflection of the predominant legislative competence of the Provinces in these fields. Provincial governments have felt, reasonably or otherwise, that to go further or faster than their neighbors would put them at a competitive disadvantage so far as their own economic development was concerned.

Canada is a parliamentary as well as a federal state. The failure of the trade union movement to exert its potential influence on governments has impeded legislation favourable to organized labour.

1. See Infra - Chapter 1

Following in the A.F.L. tradition the Trades and Labour Congress has practised an atomistic policy of supporting individual candidates sympathetic to labour's cause. This policy has been much less successful than in the United States because of the rigid party discipline characteristic of the parliamentary system which makes an individual member's views of relatively little account unless he can make them prevail within his own party. The bankruptcy of T.L.C. political action is illustrated by the fact that apart from the C.C.F., primarily an agrarian Socialist movement, there have never been more than three or four Members of Parliament who consistently represented the special interests of labour. The situation has not been basically different in the Provincial Legislatures. The Canadian Congress of Labour, following the lead of the C.I.O., has undertaken direct political action. At the 1943 Annual Convention of the Congress the C.C.F. was named as the "Political arm of labour" and the Political Action Committees threw their support behind that party in the General Elections of 1945 and 1949. The leaders and the rank-and-file of the Congress have not been united in their support of the C.C.F. and it has proven impossible to "deliver" the labour vote.

Revolutionary unionism has from time to time exerted a disruptive force in the organized labour movement. The International Workers of the World had some temporary successes in organizing the employees of the B.C. lumber industry and the Grand Trunk Railway in the early years of this century. The syndicalist One Big Union, with a radical program of revolutionary industrial unionism, was formed in 1919 and had a significant part in bringing about the Winnipeg General Strike of the same year.¹

1. For a full and scholarly account of this strike see The Winnipeg Strike of 1919 - D.C. Masters - Univ. of Toronto Press, 1950

Although the O.B.U. had a membership of some 50,000 in 1920 it soon declined to the status of a weak protest movement. Since the formation of a Canadian branch of the Communist International in 1922 communists have attempted to capture the organized labour movement. From time to time such important unions as the International Union of Mine, Mill and Smelter Workers, the Canadian Seamen's Union and the United Electrical Workers have come under communist domination.

In general the failure of the Canadian labour movement to mobilize its latent political strength has had two effects on provincial and federal legislation. Trade unions have never aroused the intense hostility of the public and of special interest groups which led to the passing of the Taft-Hartley Act of 1947 in the United States. On the other hand, Canadian labour can look back to no charter of liberties like the British Trade Union Acts of 1874 and 1906 or the American Wagner Act of 1935. The policies and activities of the organized labour movement have shown a general preoccupation with improving the lot of the worker within the framework of capitalism by collective bargaining, atomistic political action and lobbying.

Demographic Aspects.

The Canadian labour movement has been in part conditioned by the existence of several unassimilated ethnic and national groups in the Dominion. The Confederation of Catholic Workers represents a self-conscious French-Canadian nationalism, eager to preserve its way of life, against the impact of Anglo-Saxon influences. The influence of British emigrants on the Canadian labour movement is perhaps less important than in the past but the British labour tradition of direct political action has done something to temper the influence of "Gomperism" in Canada.¹

1. D.C. Masters in his The Winnipeg Strike of 1919 (U. of T. Press, 1950) asserts that the leaders in the O.B.U. and the General Strike were almost exclusively products of British radical unionism.

The unassimilated Eastern European emigrant has complicated the task of labour organization. Without a tradition of collective activity these workers have often proven docile and difficult to organize and at other times have provided the rank and file and the leadership for revolutionary unionism.

In general, differences in national background and language have hampered labour-class unity in Canada.

B. Basic Preconceptions

It is impossible for a student of the social sciences to approach any problem without bringing to it certain fundamental ideas his experience and observation have caused him to accept. I believe that much confusion can be avoided if these basic beliefs are explicitly stated so that any body of conclusions reached may be tested in the light of the writers' fundamental preconceptions. This study will proceed from these assumptions:

1. There is a definable public interest in the relations between management and labour . One writer lists its elements as follows.¹

"1. The continuing (and continuous) operation of any company that proves able honestly to survive,

2. Competitive costs which assure prices that attract a high volume of business,

3. A smooth internal functioning of the organization, reflecting friendly and amicable relations of supervisors and those supervised,

4. Conditions which give every possible opportunity for personal fulfilment and group satisfaction as work,

5. Provision of terms of employment on as high a level as the competitive conditions of the industry permit,

1. Ordway Tead - Public Mindedness Through Cooperation - Annals of the American Academy of Political and Social Science - Nov. 1946- P.162.

6. A sufficient profit to retain and attract such volume of capital as is required in the exercise of prudent managerial judgment".

There is no "natural right" of workers to join unions or to bargain collectively or to strike any more than there is an inalienable prerogative of an employer to hire and fire under conditions that he alone believes expedient. The public interest must prevail so far as it may be discovered in any particular situation.

11. The interest of management and labour are neither unalterably opposed nor fundamentally identical. Advocates of both the class warfare and the "invisible hand" theories are guilty of gross oversimplification. High wages and high profits are not necessarily antithetical, high productivity can be made to benefit both employers and employees, worker solidarity often improves the lot of labour and management and so on. On the other hand, experience fails to suggest that good will and approximate equality of bargaining power will resolve every issue. Even under the best of conditions the basic interests of labour and management can and do diverge, especially over such problems as union security, seniority and the "speed-up". Glib economic dogmas provide no solution to the complexities of labour relations.

111. The Provinces should retain the largest feasible sphere of jurisdiction in labour legislation. Dr. Eugene Forsey has deplored the "extraordinary and bewildering diversity" of provincial collective bargaining legislation.¹ There is little doubt that the B.N.A. Act as judicially interpreted does not give the Dominion adequate competence over labour matters and it is obvious that the diversity in provincial legislation seriously inconveniences officers of both unions and business firms, as well as students of labour matters.

1. Provincial Collective Bargaining Legislation-Public Affairs
Dec. 1947-pp. 35-40

On the other hand, the fact that different provinces with different problems and different prevailing social philosophies have chosen to deal with collective bargaining in different ways does not indicate that "what we have is nine peoples and nine governments, not a nation but a loose league of semi-independent states".¹ The *raison d'être* of federalism is a reconciliation of unity with diversity necessitating a large degree of autonomy to particular areas. A comparative study of collective bargaining legislation in Canada, the United States, Britain and Australia reveals that their nations have had varying degrees of success with widely divergent methods of reducing the effects of industrial strife. The need for uniformity is, I believe, counterbalanced by the advantages of experimentation as each province meets its particular problems in its own way. Rather obviously no provincial administration should be unaware of what its neighbors are doing or of the experience of other provinces with various expedients but this need can and is being met by such consultations as are provided by the annual conferences of administrators of labour legislation.

IV. Wherever possible, the legal aspects of labour relations should be clarified by statutory enactments rather than be left to interpretation by the courts in the light of the common law. Judicial interpretation in the light of common law principles almost inevitably leaves an area of uncertainty, particularly in situations involving picketing and the civil liability of trade unions. When we come to cases involving the British North America Act the problems become even more acute. The Industrial Disputes Investigation Act of 1907 was in operation for 18 years before being declared *ultra vires*.²

1. See op. cit. P. 40

2. Infra pp. 27-29

The validity of legislation delegating power by the Dominion to a Province or vice versa was a moot constitutional point until a 1950 decision of the Supreme Court of Canada.¹ It is of the most urgent necessity that the Dominion and the Provinces agree on a method of amending the British North America Act so that the intolerable uncertainties surrounding the present Constitution as judicially interpreted may be resolved.

1. See *infra* p. 40-43

Chapter ICanadian Labour Legislation and the British North America Act.

No adequate understanding of Canadian labour legislation is possible without some study of the peculiar constitutional framework within which all such legislation must be enacted. Quite understandably, the B.N.A. Act of 1867, the product of a pre-industrial age, makes reference to the relative jurisdiction of the Federal Parliament and the Provincial Legislatures over labour matters only by implication and thus the delimitation of the powers of each has come almost exclusively through the judicial interpretation of certain clauses of the Act.

A. The Text of the B.N.A. Act.¹

The relevant clauses of the B.N.A. Act are as follows:

1. The preamble to S. 91 confers upon the Federal Parliament the power to legislate for the "Peace, Order, and Good Government of Canada in relation to All Matters not coming within the Classes of Subjects --assigned exclusively to the Legislatures of the Provinces."
2. S. 91 confers upon the Federal Parliament exclusive legislative authority over,
 - (a) Unemployment insurance (B.N.A. Act 1940)
 - (b) The regulation of trade and commerce S.91(2)
 - (c) Navigation and shipping inter-provincial and international ferries (S.91) 10 and 13
 - (d) The criminal law S.91 (27)

1. 30 and 31 Vic. C.3

3. S.132 confers upon the Federal Parliament the authority to enact legislation to bring into effect any treaty made between the British Empire and foreign countries.
4. S. 92 (10) by implication confers upon the Federal Parliament the power to legislate upon matters concerning

(a) Railways, canals, steamship lines and "other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province."

(b) Steam ship lines between a Province and any British of Foreign Country.

(c) Such works as are declared by the Parliament of Canada "to be for the General Advantage of Canada or for the Advantage of Two or more of the Provinces."

5. S. 92 confers upon the Legislatures of the Provinces exclusive jurisdiction to legislate on matters concerning,

(a) "Property and Civil Rights in the Province S.92 (13)

(b) "Generally all matters of a merely local or private Nature in the Province."

6. S.94 confers upon the Governor General the authority to appoint "the Judges of the Superior District and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick."

B. Federal Labour Legislation Now in Existence.

The bulk of Federal Labour legislation now in effect is based upon the Dominion's power in matters relating to the Criminal Law (S91, 27), unemployment insurance (91,2A), navigation and shipping, inter-provincial and international transportation and communication (92,10) and the power over Federal contracts.

1. Criminal Law

Early trade unions in Canada, Britain and the United States found their existence menaced by decisions of common law courts which declared workers combinations to be criminal conspiracies in restraint of trade. A strike of Toronto Printers in 1871 was followed by a conviction of twenty-four of their leaders on charges of seditious conspiracy. It was suddenly realized that Canadian organized labour did not share in the protection afforded to British workers by the Trade Union Act of 1871 and that in Canada combinations of workmen were in fact illegal.¹

The 1872 Trade Union Act stated that the purposes of a trade union should not be considered unlawful merely because they were in restraint of trade so as to make any member of a union liable to prosecution on charges of criminal conspiracy.² S. 498 of the Criminal Code³ defines several indictable offenses in restraint of trade but specifically states that the provisions shall not apply to "combinations of workmen or employees for their own reasonable protection as such workers or employees."⁴

The Combines Investigation Act confers similar freedom upon unions.⁵

The Criminal Code makes it an indictable offense to break wilfully any contract knowing that such action is likely to endanger human life, cause bodily injury or expose valuable property to destruction. It is further declared to be a criminal offense to break any contract which will deprive the inhabitants of any place of power, light, gas or water or to break wilfully any contract with a government railway on which mail, freight, or passengers are carried if the person so doing has reasonable reason to believe that his action will delay or prevent railway services from being carried on. The Criminal Code thus attempts to protect the community from the interruption of vital services occurring because of

1. Logan pp. 43

2. Revised Statutes of Canada, 1927, C.125, S.32.

3. R.S.C. 1927, C.146.

4. R.S.C., C.146, S.498 (2).

5. R.S.C., C.146, S.499 .

deliberate breaches of contracts by employers and employees.

S.501 of the Criminal Code deals with certain acts of violence which from time to time occur in labour disputes. It is declared to be an indictable offence to use violence or intimidation to compel any person to do something he has a lawful right to do or to refrain from doing anything from which he has a lawful right to abstain. Watching and besetting, following another person persistently about from place to place or hindering another in the use of his property are also defined as indictable offenses.¹ A 1934 amendment declared that coming near or attending at another's house or place of business shall not be deemed watching and besetting.² S502 and 503 of the Criminal Code further defines certain acts of violence in pursuance of unlawful combinations and conspiracies.³

The Federal Parliament has also used its power over the Criminal Law to make it an indictable offence for anyone to send a ship registered in Canada to sea if such ship should be unseaworthy because of over-loading or under-loading. For some reason this section applies only to voyages on the inland waters of Canada and to or from the inland waters of the United States.⁴

S.502 A of the Criminal Code, the "Woodsworth Amendment", of 1939 ranks with the sections of the Code exempting unions from prosecutions for criminal conspiracy as the most valuable legal defence of union interests enacted by the Federal Parliament. The section makes it an indictable offense for an employer or his agent to ;

- (a) refuse to employ or dismiss from employment any person for the sole reason that such person is a member of a lawful workers association whose purpose it is to raise wages or regulate conditions of work in a lawful manner,

1. R.S.C., C 146. S.501
 2. Statutes of Canada, 1934, C.47, S.12.
 3. R.S.C., C.146, SS.502, 503.
 4. R.S.C. C.146, SS.288,289.

(b) seek by intimidation, loss of position or employment or threat of such loss or by any pecuniary penalty to compel workers to abstain from belonging to a lawful trade union to which they have a lawful right to belong,

(c) To agree, conspire or combine with others to do any of the things mentioned in (a) and (b).

Under the exclusive jurisdiction of the Dominion over the Criminal Law the Federal Parliament in 1909, as a result of pressure from the rather un-natural combination of the Trades and Labour Congress and, the Lord's Day Alliance, enacted the Lord's Day Act,¹ which with many exceptions prohibited Sunday employment and required that in cases in which a person was lawfully employed on Sunday that he be given a period of twenty-four consecutive hours without labour some other day of the week.

The Criminal Code has thus attempted to mitigate the results of the harsh and anachronistic decisions of the common law courts in defining the rights and duties of employers and employees.

2. Unemployment Insurance.

Soon after the Judicial Committee of the Privy Council declared the Employment and Social Insurance Act of 1935 to be ultra vires the Federal Parliament Dominion officials began to urge the Provinces to agree to a constitutional amendment to give the national government power to enact a scheme of unemployment insurance. In 1940 the last remaining Province, Quebec, agreed to the proposed amendment and in 1940 the Imperial Parliament, on the receipt of a Joint Address from both Canadian Houses, amended the B.N.A. Act by adding "Unemployment Insurance" to the enumerated list of subjects within the exclusive legislative competence of the Dominion.²

1. Statutes of Canada, 1939, C.30, §11

2. Constitutional Amendment in Canada - Paul Gerin - Lajoie
University of Toronto Press 1950 pp.278-279

Almost immediately Parliament enacted a comprehensive system of contributory unemployment insurance for workers in covered occupations and earning below certain salaries and a system of national employment offices to administer the Act.¹

3. The Dominion Power over inter-Provincial Transportation and Communication and over Navigation and Shipping.

The Railway Labour Disputes Act of 1903, the Industrial Disputes Acts of 1908, 1927, and 1939, and the Industrial Disputes and Investigation Act of 1948, will be discussed in detail later in this thesis.² It is sufficient to note here that Dominion has jurisdiction to enact such collective bargaining legislation as is now in effect by virtue of its implied powers over various international and interprovincial systems of transportation and communication under S. 92 (10) of the B.N.A. Act.

Two significant judicial decisions in 1932 conferred the authority to legislate in matters concerning aeronautics and radio broadcasting upon the Federal Parliament. Under this authority the Dominion has enacted a scheme for workmens' compensation for flying personnel of civilian air lines³ and a system of licensing for operators of radio transmitters.⁴

Under its jurisdiction over "Navigation and Shipping" the Federal Parliament has enacted labour legislation governing both inland and international shipping. The Canada Shipping Act⁵ enacts concerning minimum ages of seagoing personnel, contracts of merchant seamen, discharge of seamen pilot's licenses, safety conditions on steamships, standards for stevedores loading and unloading ships and other matters. In general, Dominion legislation governing shipping has endeavored to bring conditions on Canadian ships in conformity with I.L.O. Conventions.⁶

1. Statutes of Canada 1940, C.44 with amendments.

2. Infra Chapter 3

3. Statutes of Canada 1944-45, C.28, S.5.

4. Statutes of Canada 1938, C.50, S.4.

5. Statutes of Canada 1934, C.44 with amendments.

6. Labour Legislation in Canada as existing December 31, 1948
Dept. of Labour 1950 - P. 32

In 1946 the Federal Parliament enacted a comprehensive Workmen's Compensation Law for merchant seamen.¹

4. Federal Jurisdiction over Dominion Government Works.

Although legislation regarding working conditions of most employees except those engaged in inter-provincial transportation and in shipping is under provincial control the Provinces have no power to:

- (a) regulate the working conditions of the servant of the Dominion,
- (b) regulate the working conditions of persons engaged in works declared by the Federal Parliament to be for the general advantage of Canada,²
- (c) regulate the working conditions of those engaged in Federal Government contracts.

In 1900 a resolution of the House of Commons declared it to be the policy of the Government to pay the generally accepted level of wages in Federal undertakings or in undertakings aided by Federal funds. P.C. 1206 in 1922 outlined the industrial standards to be inserted in Federal contracts for construction works for the use of the Government. In 1930 the Fair Wages and Eight Hour Day Act fixed a limit of eight hours per day (lowered to 44 hours per week in 1945) for persons employed on Federal works of construction and repair. In 1949 all Fair Wages legislation and regulations were consolidated in P.C. 5547.³

As well as regulating wages and working conditions of Dominion civil servants and workers engaged on Federal works, the Federal Parliament has also legislative jurisdiction over industrial standards in Dominion Crown corporations like Trans-Canada Airlines, the Polymer Corporation and the Canadian Broadcasting Corporation.

1. Statutes of Canada 1946 - C 58 and amendments.
2. The most important legislation under this section of the B.N.A. Act, S.92 (10c), is that dealing with the grain trade.
3. The material for this paragraph is taken from Fair Wages Policy H.S. Johnstone - Labour Gazette-Sept. 1950 pp. 1543-1548.

5. Other Federal Legislation Directly Affecting Labour

Under other sections of the B.N.A. Act apart from those mentioned above the Dominion has enacted legislation of a more or less direct concern to labour. Some of this legislation may be noted briefly.

1. Under its concurrent power over immigration the Federal Parliament has enacted a comprehensive immigration policy.
2. Under its power over "Naturalization Aliens" (S. 91,25) the Federal Parliament has enacted legislation forbidding the importation of alien labour under contract.¹
3. Under its jurisdiction over "copyrights" (S.91,23) the Federal Parliament has enacted legislation for the registration of union labels and their exclusive use by the union which does so.²
4. Under its authority over "Bankruptcy and Insolvency" (S.91,21) the Federal Parliament has enacted legislation which gives debts owing by a bankrupt to any Workmens' Compensation Fund or to employees for three months' wages a "secured creditor" status.³
5. Under its authority over "Militia, Military and Naval Service and Defence", (S.91,7), the Federal Parliament has enacted comprehensive program of veterans' rehabilitation involving such labour matters as apprenticeship conditions in the "Training on the Job" program and the reinstatement of veterans in their civilian occupations.
6. Under its implied jurisdiction to incorporate interprovincial companies the Federal Parliament has enacted legislation making the directors of such companies personally liable for the wages of the company's employees for six months if the corporation has gone into liquidation under

1. Revised Statutes of Canada 1927 C 97

2. Revised Statutes of Canada 1927, C 71 and Statutes of Canada, 1934 C 38 S.2

3. Revised Statutes of Canada 1927, C 11 S 121 and amendments.

the Bankruptcy Act and also that it shall be an ancillary object of any such company to establish or aid in the support of employee pension plans.¹

7. Nearly forty per cent of the total area of Canada is within the North west Territories and the Yukon and in these regions the Federal authorities have exclusive legislative competence. In both cases workmens' compensation, mechanics' liens and other labour legislation of a somewhat rudimentary nature exists.² As only 483 workers belonged to unions in these areas in 1948 there is no collective bargaining code.³

6. Canadian Labour Legislation and the Treaty-making Power

It is an elementary principle of international law that the power to make treaties is, in countries owing allegiance to the British Crown, a Royal Prerogative. By convention, however, this aspect of the Prerogative is exercised only on the advice of the Crown's responsible ministers, and so far as Canada is concerned these ministers are the Federal Cabinet. Since the Statute of Westminster was enacted there has thus been no legal barrier to the Federal Executive entering into any treaties or conventions it may so desire.

The competence of the Federal Parliament to enact legislation implementing the international obligations into which Canada has entered is a more complicated matter. Two decisions of the Judicial Committee of the Privy Council in the 1920's had strengthened the idea that Parliament had competence to enact such legislation. A convention had been drawn up and signed at the Paris Conference of 1919 making elaborate provisions for the regulation of aerial navigation. The convention was signed by His Majesty on behalf of the British Empire by name and the Parliament of Canada had enacted the

1. Statutes of Canada, 1954, C.33 S. 96 and S.14

2. Ordinances of the Yukon and Ordinances of the Northwest Territories-text of ordinances is given in labour legislation in Canada as existing Dec. 31, 1948. Dept. of Labour 1950

3. Labour Organization in Canada 1948 Dept. of Labour P. 12

Regulations in question. In a reference to the Judicial Committee, the Committee held that Parliament had exclusive jurisdiction to enact such legislation under S.132 of the British North America Act.¹ A less clear-cut reference was made by the Committee involving Parliament's exclusive power to regulate radio broadcasting.² The International Radiotelegraph Convention of 1927 had been negotiated for Canada by representatives appointed by the Governor-General in Council, ratified and confirmed by an instrument of the Canadian Secretary of State for External Affairs and implemented by the Radiotelegraph Act of 1927 and regulations made under this Act.³ The Judicial Committee declared that the legislation in question did not come under the provisions of S 132 of the B.N.A. Act but asserted that the preamble to S.91, which conferred upon the Federal Parliament the general residuary power, gave Parliament exclusive jurisdiction to enact such legislation.

Encouraged by the liberal interpretation of the treaty-making power by the judiciary and alarmed by the failures of the Provinces to enact adequate industrial standards legislation, Parliament in 1935 passed the Weekly Rest in Industrial Undertakings Act, the Minimum Wages Act, and the Limitation of Hours of Work Act. The statutes were passed by the Dominion Parliament in implementation of conventions adopted by the International Labour Organization and ratified by Canada in the previous year.

In a reference to the Judicial Committee, counsel for the Dominion sought to justify the legislation on two grounds. Firstly, it was contended that the Government of Canada had an obligation to implement the conventions because of Article 405 of the Treaty of Versailles which set up the International Labour Organization. This treaty had been made in the name of the British Empire (although signed specifically by a Canadian Minister) and the obliga-

1. In the Regulation and Control of Aeronautics in Canada (1932) A.C. 54.
2. In re Regulations and Control of Radio Broadcasting in Canada (1932) A.C. 304
3. R.S.C. 1927, C.195.

tions resulting from it came within the purview of S.132. In the second place, the validity of the legislation was defended under the general residuary powers of S.91.

The Judicial Committee rejected the Dominion's contentions on the following grounds:

1. The obligations under the ratified conventions were not obligations of Canada as part of the British Empire but of Canada by virtue of her new status as an "international juristic person."
2. The obligations to perform the conventions did not arise under the Treaty of Versailles until the Canadian Executive, acting solely under its own volition, acceded to the conventions.
3. The general residuary power did not give the Federal Parliament exclusive authority to legislate for performing the obligations of Canada not within the terms of S.132 or the enumerated heads of S91.
4. The general residuary power did not come into effect because the legislation was not concerned with matters of such general importance as had "ceased to be merely local and provincial" and had "Become matters of national concern."

The accession of Canada to an independent status thus was held not to have given the Dominion the authority to encroach upon the exclusive provincial powers enumerated in S 92 under the guise of the treaty-making power. The power of the Federal Parliament to implement any treaty is thus governed by the division of legislative powers laid down in S 91 and S. 92, unless such treaty should be made on behalf of the British Empire.

The position taken by the Judicial Committee seriously inconveniences Canada in her dealings with other nations. It has become more and more obvious that no nation, least of all one as dependent on economic conditions elsewhere as Canada, can deal adequately with its internal problems by purely unilateral action, although the theory that a country which enacts

superior industrial standards is at a competitive disadvantage in world trade is, under most conditions, questionable.¹ Neither do other federal states labour under such disabilities in their international dealings. Art. VI of the American Constitution decrees that all treaties shall be "the supreme Law of the Land" if they are validly made by the President and concurred in by two-thirds of the Senators present, and the High Court of Australia has given the power of the Commonwealth Government over "external affairs" a liberal interpretation.² There is also little doubt that the Canadian Government has ratified international conventions of one nature and another without making any serious attempt to implement them or to encourage the Provinces to do so. As Mr. James Eayers remarks: "After four years of listening to the Canadian delegations uphold the sanctity of provincial rights over and against the international authority, pay scrupulous attention to these rights, and invoke the inviolable constitution, the delegates of other nations must be beginning to wonder whether the inviolable constitution is nothing but a convenient device which the Canadian government can and does use to avoid sacrificing its sovereignty to the international body and its affiliated agencies".³

The present constitutional position has been the object of criticism in many quarters.⁴ The Rowell-Sirois Report suggested that the Dominion and Provinces come together to devise methods to implement I.L.O. conventions (but not other international agreements) which Canada had ratified and that the Provinces give to the Dominion such power. Delegations, as we know now, will necessitate a constitutional amendment.⁵

1. Lester, H.A. Economics of Labor - Macmillan 1949 pp 528-535.
2. An Australian View of the Hours of Labour Case John D. Holmes 15 C.B.R. 428.
3. Canadian Federalism and the United Nations - C.J.E.P.S. May 1950 p 182
4. The Canadian Bar Review in 1937 devoted an entire issue to a symposium of the decisions in the Bennett "New Deal" case with articles by John D. Holmes, Frank Scott, A.B. Keith, W.P.M. Kennedy, Vincent C. MacDonald and others. XV C.B.R. See also Matas - Treaty-making in Canada XXV C.B.R. pp458-477
5. Report of Royal Commission on Dom-Prov. Relations Book II pp.48-49

Most critics of the present constitutional position in regard to treaties neglect the real issue which is the reconciliation between federalism and international action. It should be obvious that if the Federal Parliament undertook to implement in a thoroughgoing way the recommendations of the multifarious economic and social agencies of the United Nations provincial autonomy would be meaningless. Although modern technology may have made it possible for Canada to become a unitary state, there can be little doubt that the social, cultural and economic diversities which made federalism necessary in 1867 still persist. In particular, any proposal which would give the Federal Parliament almost unlimited control over labour relations would run directly into the barrier of the Civil Code of Quebec and few who know the temper of French Canada could doubt that the result would be a separate Laurentian state. Nor is there evidence, as there perhaps was in 1937, that the Provinces are incapable of enacting advanced collective bargaining and industrial standards legislation.

Prof. H.F. Angus outlines a plausible compromise to a difficult problem by suggesting that the B.N.A. Act be amended so that the Federal Parliament would have the competence to implement international conventions which had been ratified by a considerable number of states.¹ Under Prof. Angus' proposal the demand for the necessary relinquishing of provincial powers would come not from the Dominion but from a group of highly diversified nations. This solution appears to me to be the only one through which the seemingly antithetical demands of Canadian federalism and international collaboration can be resolved.

1. The Canadian Constitution and the United Nations Charter C.J.E.P.S. May, 1946 pp 127-135. For the point of view of Canada's foremost "centraliser" see "Constitutional Adaptation to Changing Functions of Government" F.R. Scott - C.J.E.P.S. Aug. 1945. pp. 320-341

In the meantime a great deal can and is being done by officers of the Dominion Department of Labour to encourage provincial governments to enact legislation to bring their standards up to those of I.L.O. conventions. Each Province is informed of these conventions by Federal officials and the provincial attitude in recent years appears to have been sympathetic and constructive in most cases. Ultimately however, some form of constitutional amendment to allow the Federal Parliament to fulfil its international obligations more adequately is clearly necessary.

D. Federal Jurisdiction over Collective Bargaining.

In 1907 the Parliament of Canada enacted the Industrial Disputes Investigation Act¹ which was designed to protect the public interest against precipitate work stoppages. in mining, railway, telegraph, telephone and other public utility industries. To this end, the Act required that any labour dispute which involved an employer of more than ten employees in the covered industries should be submitted, if the case were deemed worthy by the Minister of Labour, to a conciliation board. A stipulated period was provided during which the Board was carrying on its investigation when a strike or lock-out was illegal. The recommendations of boards were to be made public through the Labour Gazette.

Legal proceedings involving the constitutionality of the Act of 1907 were instituted in the Province of Quebec in 1911. The case in point involved the appointment of a board of conciliation to deal with a dispute which had arisen between the city of Montreal and the Montreal Street Railway Employees' Union. In upholding the constitutionality of the Act, Mr. Justice Lafontaine of the Supreme Court of Quebec pursued the following line of argument,²

1. Statutes of Canada 1907- C20.

2. Judicial Proceedings Respecting the Constitutionality of the Industrial Disputes Investigation Act, 1907- Kings Printer, Ottawa, pp 255-258.

(1) The Aim of the Act was to deal with "a social and economic, condition existing throughout the Dominion and thus was of a general nature and not of a purely "local and private" character"". (S92, 16)

(2) The conditions under which the Act was enforced in the case in question could not be regarded as within the subject matter of "property and civil rights" (S92, 13) nor of the administration of justice in a Province (S92,14) and so could not be held to infringe upon the exclusive authority of a Provincial Legislature under these sections of the B.N.A. Act.

(3) The Act was "in a general way" essentially connected with the peace order, and good government of Canada and thus was within the competence of the Federal Parliament according to the preamble to S.91.

The judgment of the Superior Court was in 1913 affirmed by the Superior Court in Review and the plaintiff did not carry the case to a higher judicial authority.

In 1925 the constitutional validity of the Industrial Disputes Investigation Act was challenged successfully by the Board of Electric Commissioners of the City of Toronto.¹ The decision by the Judicial Committee in declaring the Act ultra vires the Dominion is one of the most significant in Canadian constitutional history. The Dominion's case was based upon its authority to legislate in respect to "trade and commerce", the general "peace, order and good government" residuary power of S.91 and in respect to exclusive Dominion competence over the criminal law. In regard to the first point, Lord Haldane in delivering the Committee's decision declared that jurisdiction over "trade and commerce" related to "matters of national and general concern" rather than to contracts of "a particular trade or business" which come within the purview of "property and civil rights within the Province." The justification given for this interpretation was that

1. Toronto Electric Commissioners V. Snider (1925) A.C. 396.

the Fathers of Confederation in drawing up the Quebec Resolutions had included banking, bills of exchange and promissory notes under the subjects over which the Federal Parliament had exclusive authority, which provisions would have been superfluous if they had wished that the Dominion should regulate "contracts of a particular trade or business." In respect to the second contention of Dominion counsel, the Committee insisted upon a very narrow interpretation of the preamble to S.91. The "peace, order and good government" residual authority was held to justify Federal encroachment of fields normally within provincial competence only in situations of "extraordinary peril to the national life of Canada". In the third place, Lord Haldane reiterated the principle that had been stated in several previous decisions that the Dominion did not have the constitutional authority to interfere in fields of normal provincial competence by reason of its jurisdiction over the criminal law. The Act was thus ultra vires the Dominion.

At the 1926 Session of Parliament a revised Industrial Disputes Investigation Act was passed restricted in application to works within Federal jurisdiction and to disputes within provincial jurisdiction in which the Provincial Legislatures passed enabling legislation. The 1926 Act (extended in its coverage under the Dominion war powers in 1939) was in operation until it was replaced by the War Labour Regulations contained in P.C. 1003 in 1944.

E. Federal Jurisdiction over Unemployment Insurance

Another judicial attack on the competence of the Dominion to enact legislation dealing with social problems which could be resolved only by action on the part of the Federal Government was made in 1937 when the Employment and Social Insurance Act of 1935 was declared ultra vires. The Act, whose constitutional validity had been denied on a reference to the Supreme Court of Canada, provided for a system of compulsory national employment insurance to be financed from the contributions of workers in certain covered industries, from payments by their employers and by Federal funds. An appointed commission to administer the Act and a system of national employment exchanges were also provided for.¹

Counsel for the Dominion justified the validity of the Act on three grounds.²

1. In Article 23 of the Treaty of Peace of 1919 Canada had pledged herself to endeavour to maintain "fair and humane" conditions of labour. To do so, it was contended that a system of national employment insurance and national labour exchanges was necessary.
2. Under the desperate economic conditions which prevailed in Canada before and during 1935 the Act was within the competence of the Dominion under the "peace, order and good government" preamble to S. 91.
3. It was further contended that the validity of the Act could be justified under the enumerated headings of S. 91 which gave the Dominion exclusive authority over "The Public Debt and Property" and conferred upon the Federal Parliament the power over the "Raising of money

1. Statutes of Canada 1935, C. 38.

2. A.G. for Canada V. A.G. for Ontario and others (1937)
A.C. 355

by any Mode or System of Taxation". The argument was that the obligations imposed upon employers and workers constituted a tax, that the money so raised became public property and that the Dominion thus had complete legislative authority to direct that such funds together with other revenues raised by general taxation be applied to an insurance fund in accordance with the provisions of the Act.

The Judicial Committee brushed aside all three contentions and declared the Act to be ultra vires as an encroachment upon exclusive Provincial jurisdiction over "property and civil rights." The Committee followed their recent decisions in the cases involving the three industrial standards acts of the Bennett Government in denying that the stringent economic conditions of the mid 1930's gave the Dominion any competence to encroach upon fields of jurisdiction normally within exclusive Provincial competence by reason of the preamble to S.91. The Act did not deal with any "special emergency" but enacted a scheme that was intended to be a permanent feature of Canadian life. The treaty-making power of the Dominion under S.132 was similarly emasculated. In regard to Dominion's counsel third contention, the Committee affirmed the competence of the Federal Parliament to levy any tax it so wished but questioned the validity of its disposal under the Act. The criteria of any Dominion expenditure was whether "in reality, in pith and substance", it invaded the exclusive provincial field of "property and civil rights within the Province" and according to this standard the Act in question was ultra vires.¹

1. Interestingly, this argument was advanced in a somewhat similar form by the Supreme Court of the United States in the 1936 decision of United States V. Butler in which the Agricultural Adjustment Act was held in valid. See "The Powers of the National Government"- Walter F. Dodd The Annals of the American Academy of Political and Social Science Vol. 185 p. 70.

F. The Constitutional Validity of Provincial Labour Legislation

As has been outlined, the constitutional validity of several significant Federal labour enactments has been challenged by the judiciary. However, only one piece of Provincial labour legislation has been declared ultra vires although several cases have involved the constitutionality of such legislation.

In two cases plaintiffs have attempted to challenge Provincial legislation on the argument that such laws conflicted with Ss. 496-498 of the Criminal Code which declare illegal certain combinations in restraint of trade. The validity of the Quebec Labour Agreements Extension Act of 1934¹ and the Saskatchewan Industrial Standards Act of 1937² were both upheld as the primary purpose of both Acts was declared to be the securing of better wages and working conditions for employees and that the Provinces had thus not enacted to create illegal combinations in restraint of trade.

Two other cases³ have resulted in the validity of Provincial labour legislation being upheld against the challenge that such legislation was ultra vires because it enacted penalties for infringement of its provisions and thus encroached upon the exclusive authority of the Dominion over the Criminal Law. In both cases the penalties provided were declared ancillary to the enforcement of the industrial standards legislation in question and thus did not constitute an encroachment on Federal authority.

The Alberta Coal Miners' Wages Security Act of 1928 provided that all coal mine owners should furnish a bond or other security each year so that the payment of employees during the current year would be guaranteed.

1. Diva Shoe Co. V. Gagnon (1937) 70 Que. K.B. 411
2. R.v.Pulak (1939) 2W.W.R. 219
3. Ontario Boys' Wear Ltd., and Tolton Mfg. Co. V. Advisory Committee and A.G. for Ontario (1943) 3 D.L.R. 474 and Aird and Son Ltd. V. Local 500 International Union of Shoe and Leather Workers, (1948) 3 D.L.R. 114 (Que.)

The judiciary held the Act intra vires against the plaintiff's charge that it infringed upon Dominion authority over Federally-chartered companies and over "trade and commerce".¹

In several cases² plaintiffs have endeavoured to challenge the validity of Provincial labour legislation setting up quasi-judicial administrative boards as being an encroachment on the exclusive power conferred upon the Governor General to appoint "the Judges of the Superior, District and County Courts in each Province" by S. 96 of the B.N.A. Act. Although a line of cases have been decided on the basis of this Section the 1948 decision of the Judicial Committee involving the validity of Section 5 (e) of the Saskatchewan Trade Union Act is the most instructive. This part of the Act³ vested in an administrative board power to order reinstatement of an employee who had been discharged contrary to the provisions of the legislation and to order the employer to compensate the worker for monetary loss suffered by reason of such discharge. The enactments of other Provinces with such legislation provide for reinstatement and compensation by the courts of law. The Privy Council denied that the board was, in a strict sense, a court at all. The qualifications of its members differed from the qualifications of judges in that it had been found necessary to choose appointees with extra-judicial knowledge of labour problems. The jurisdiction of the Board was not invoked by the employee for the enforcement of contractual rights he could assert elsewhere. Furthermore the Board had been set up to deal with far-reaching industrial conflicts and to perform functions that were in no sense analagous to those of Superior, District and County Courts in 1867. In brief, although the Judicial Committee refused to answer the question as to whether the Board exercised judicial functions, and although there was no

1. (1932) 2 D.L.R. 475 (C.A.)

2. Ricard V. Crete, (1932) 3 D.L.R. 660 (Que.), Hughes V.R., (1947) 2 WWR 684 (B.C.) etc.

3. Statutes of Saskatchewan, 1944 C 69.

appeal from its decisions to a court of law, these facts did not make it a Superior, District or County Court within the meaning of S.96.¹

The only case in which the constitutional validity of Provincial labour legislation has been challenged successfully involved the authority of the Saskatchewan Government to apply the Provisions of its labour relations and industrial standards legislation to employees of the Canadian Pacific Railway and Express Companies.² The Appellate Section of the Supreme Court of Saskatchewan decided that the employees involved were engaged on "Works and Undertakings connecting the Province with...other or others of the Provinces" and so were under the exclusive Federal jurisdiction by the provisions of S.92 (10,a,) of the B.N.A. Act. Further the Court declared that if the matter of fixing tolls on railways were a matter under exclusive Dominion authority, as had been decided in a recent case,³ the competence of the Province to enact legislation dealing with wages, hours of work, holidays, etc., would put the Federal authorities in an anomalous position. The Court also decided that employees in C.P.R. Hotels in Saskatchewan were engaged in occupations adjunct to "Works and Undertakings" dealt with by S.92 (10) and were under exclusive authority of the Dominion. However, in a later case it was decided by the Judiciary that conditions of work in the C.P.R.'s Empress Hotel in Victoria were governed by the labour legislation of the Province of British Columbia as the hotel was merely an "ancillary convenience" of the Railway and not a part of it.⁴

1. John East Iron Works Ltd. V. Local 3493 United Steelworkers of America 1948 2 W.W.R. 1055 for a discussion of this case see Labour Relations and Precedents in Canada - A.C. Crysler - Carswell Pub. Co. 1949 pp.67-68.
2. C.P. Railway Co. and C.P. Express Co. V. A.G. Sask., (1947) 2 W.W.R. 909 (Sask. C.A.) This decision was upheld by the Judicial Committee 1950 A.C. 122
3. Quebec Railway, Light and Power Co. V. Beauport (Town) (1945) S.C.R. 16
4. Reference re Application of Hours of Work Act to Employers of C.P.R. in Empress Hotel (Victoria) 1948 3 D.L.R. 417

G. Labour and the Constitution in World War II

It is not too extreme to say that the British North America Act as judicially interpreted provides Canada with two constitutions, that of peace-time exalting Provincial jurisdiction at the expense of Dominion and that of war-time transforming our nation into a virtual unitary state.¹ The emergency powers conferred upon the Federal Government in time of war arise from the preamble of S.91 which gives the Dominion authority to make laws for the "Peace, Order and Good Government of Canada" in relation to all subjects not assigned exclusively to the Provinces, and, to a lesser extent, from the power of the Federal Parliament over "Militia, Military and Naval Service and Defence".

In Sept., 1939 the War Measures Act,² which had been passed by the Federal Parliament in 1914 and had never been repealed, was declared in force. The Act conferred upon the Governor in Council (not the Federal Parliament) the authority to

"make such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada."

These sweeping powers as in effect during the War and after by the various National Emergency Transitional Powers Acts constituted the legislative authority for the enactment of Canada's first national labour code by Orders-in Council. In no case has the judiciary seen fit to challenge the authority of the Governor-General-in-Council under these emergency powers³.

1. F. Scott - The Constitution in the Post War World in Canada After the War. ed. by A. Brady and F. Scott.
2. 5 Geo. V. Chap. 2
3. For significant cases in which private individuals attempted unsuccessfully to challenge these emergency powers see Reference re Regulations of Chemicals (1943) S.C.R. and Factum of A.G. Canada in Matter of Reference as to the Validity of the Orders-in-Council of 15 Dec. 1945 relating to the Persons of Japanese Race.

On Nov. 7, 1939, P.C. 3495 extended the provisions of the Industrial Disputes and Investigation Act to all industries engaged in war production. P.C. 3495 was supplemented on June 6, 1941 by P.C. 4020 which provided for an Industrial Disputes Inquiry Commission whose duties included the making of a prompt report to the Minister of Labour in the case of any war industry in which a strike or lock-out appeared imminent.

It is significant to note that until the enactment of P.C. 1003 in February, 1944 there was no Federal legislation which made it compulsory for employers to bargain with their workers. P.C. 2685 of June 19, 1940 merely cited the Cabinet's approval of the principles that workers should be free to organize to bargain collectively in unions free of employer control and that every agreement which resulted from such bargaining should provide a method of settling disputes arising from such agreement without work stoppages. However, the Order remained simply a statement of Federal policy. No penalty was provided for any employer who refused to bargain with a union of his workers' choosing nor was any board set up to administer the Order.

Although the Government had at various times expressed itself in favour of the principle that wages in war industries should be fixed through the process of collective bargaining, P.C. 7440 of Dec. 16, 1940 provided for wage ceilings in industries under the I.D.I. Act and was for the guidance of conciliation boards appointed under the Act. P.C. 8253 of Oct. 24, 1941 repealed P.C. 7440 but extended its provisions to all employers. Wage rates were to be stabilized at the level of Nov. 15, 1941, although provisions were made for the raising of unduly low wages and cost-of-living bonuses were to be given when the price level rose. The Order made provisions for its admin-

istration by a National War Labour Board and nine Regional Labour Boards, each agency to consist of an independent chairman and an equal number of employer and employee representatives. By P.C. 9384 of Dec. 1943 the bonus system was dropped and wage increases were to be granted only where gross irregularities or injustices existed and where it could be shown that the increase would not require a rise in the price of the product.

Almost inevitably, the right of employees in war industries to strike was curtailed under the War-Time Orders. Under the I. D.I. Act a strike could not lawfully take place until after the Board of Conciliation had completed its report. The provisions of P.C. 7307 of Sept 16, 1941 outlined the conditions under which a strike could lawfully be called after the Board's report had been made. The procedure was as follows:

- (1) Employees desiring to strike were required to notify the Minister,
- (2) The Minister could then, if he were of the opinion that the strike would interfere with the efficient prosecution of the war, direct a strike vote under conditions which he determined,
- (3) All employees who, in the opinion of the Minister, were affected by the dispute or whose employment would be terminated by the strike had the privilege of voting. Unless a majority of all employees so designated voted in favour of strike action, any strike called was unlawful.

P.C. 5380 of July 29, 1941 provided that under certain conditions the militia could be called out to suppress an unlawful strike likely to impede production in war industries or defence projects.

Until the passage of P.C. 1003 the position of labour under the War-time Orders was distinctly unsatisfactory. Wages had been "frozen", the right to strike curtailed, collective bargaining was not compulsory upon

employers and organized labour felt that it had not been given adequate representation on government agencies with a direct interest in labour activities .

P.C. 1003 of Feb. 17, 1944 was Canada's first national labour code. It was declared that every employer and employee had a right to be a member of an employers' association or a trade union and to bargain collectively. Employers were required to bargain in good faith and to refrain from discrimination against union members. Union organizers were forbidden to coerce workers to join unions or to canvass on the employer's premises during working hours. A War-time Labour Relations Board, with regional boards, was set up to certify the bargaining unit and to see that bargaining was carried on in good faith. The order provided that if at the close of 30 days from the time a labour dispute had been referred to the Board no agreement had been reached the Board, at the request of either party, could ask the Minister to appoint a conciliation officer to assist further negotiation. If within 14 days (or such additional period as the Minister might allow) no agreement was reached the Minister was required to appoint a conciliation board. The Order also provided heavy penalties on a per diem basis for any employer, union official or worker who engaged in a strike or lockout contrary to the provisions of the Order. Finally, it was provided that the Minister could, with the approval of the Governor in Council, enter into an agreement with any Province for the administration of the Order within the area of that Province. By the end of the war such agreements had been concluded with all the Provinces but Alberta and Prince Edward Island. These agreements lapsed in May, 1947.¹

1. Crysler - Labour Relations and Precedents in Canada. p 53

H. The Delegation of Legislative Powers by the Provinces to the Dominion and by the Dominion to the Provinces.

For some time students of Canadian constitutional law have suggested the delegation of powers by the Dominion to the Provinces and by the Provinces to the Dominion as a method of introducing a measure of flexibility into our constitutional structure,¹ although it was a point of dispute as to whether the use of this device would necessitate an amendment to the B.N.A. Act. The Rowell-Sirois Commission recommended that the Act be amended so that delegation of legislative powers would be possible. In any situation the delegating legislation would be operative only if the Government to which the delegation was made was agreeable. An agreement of the sort recommended by the Commission might be made for a limited period or for perpetuity, but any agreement could be revoked or altered only by mutual consent.²

As has been outlined³ P.C. 1003 provided that the Minister of Labour could enter into agreements with the Provinces for the administration of any part of the Order. With the expiration of the War-Time Orders several of the Provincial Legislatures enacted new collective bargaining legislation which provided for delegation. An 1948 amendment to the Alberta Labour Act empowered the Lieutenant- Governor in Council to enter into agreements with the Government of Canada for the application by Federal authorities of the Industrial Disputes Investigation Act of 1927 in disputes in the coal mining and meat-packing industries in which collective bargaining usually involved workers and employers on an industry-wide basis.⁴ The Ontario Labour Relations Act of the same year provided that the Minister of Labour, with the approval

1. Delegated Legislation E.F. Shannon 6 C.B.R. 245-261 (Can. Bar Review) Delegation, a Way over the Constitutional Hurdle - Raphael Tuck 1945 23 C.B.R. pp 79-104
Difficulties of Divided Jurisdiction J.A. Corry - Report for Commission on Dominion-Provincial Relations - King's Printer, Ottawa 1940.
2. Report of Royal Commission on Dominion-Provincial Relations Book II pp 72-73
3. infra p. 38
4. Statutes of Alberta 1948 c 11 s (2)

of the Lieutenant-Governor in Council could enter into such agreements with the Federal Minister of Labour as were deemed necessary for the enforcement of the Act and that the Lieutenant-Governor in Council could authorize Provincial officers to carry out powers over labour matters delegated to Ontario by the Parliament of Canada.¹ In 1948 also the Manitoba Labour Relations Act provided that if the Parliament of Canada enacted legislation which was "in the opinion of the Lieutenant-Governor in Council....substantially uniform" with the Act the Minister of Labour could enter into an agreement with the Federal Government for the administration of the Act in designated undertakings or industries.²

Provisions of the Industrial Relations and Disputes Investigation Act³ enacted by the Federal Parliament in 1948 indicated that the Dominion authorities were willing to cooperate with the Provinces in administering labour legislation in businesses and industries under Provincial jurisdiction. S.62 declared that in cases where the legislation enacted by the Provincial Legislature was "substantially uniform" with the provisions of the Act the Federal Minister of Labour, with the consent of the Governor in Council, could enter into an agreement with the Provincial Government for the administration of the Provincial legislation by Dominion authorities. The Act provided that such agreement could provide for the administration of Provincial labour legislation "with respect to any particular trade or business" and for the payment by the Provinces to the Dominion for expenses that the latter had so incurred.

It was finally settled by a Supreme Court of Canada decision in 1950 that the type of delegating legislation described above was unconstitutional in a reference involving Bill 136 which had been enacted by the Nova Scotia

1. Statutes of Ontario 1948 C 51 ss. 7 (1) (b) and 8.
2. Statutes of Manitoba 1948, C.27, s.60.
3. Statutes of Canada 1948, C.54.

Legislature in 1947. The legislation in question had provided that the Lieutenant-Governor in Council could by proclamation delegate to or withdraw from the Parliament of Canada authority to legislate in regard to any matter within exclusive Provincial jurisdiction under the enumerated heads of S. 92 of the B.N.A. Act and that the enactments made by the Dominion under such delegated authority would have the same effect as if they were made by the Province. The Act also conferred upon the Provincial authorities the power to enact and administer legislation in relation to employment in any industry under Federal jurisdiction if the Parliament of Canada should enact the requisite delegating legislation.

The Supreme Court of Nova Scotia, with one justice dissenting, ruled the Bill ultra vires. the Provincial Legislature and the Supreme Court of Canada concurred unanimously in an appeal by the Provincial authorities.¹

The argument advanced by the N.S. Court was accepted by the Supreme Court of Canada and ran as follows:

1. There is no express power of delegation conferred upon either Province or Dominion by the B.N.A. Act. Neither is there any implied power, for, if the British Government had intended to confer authority so far-reaching in its possible effects, it would have explicitly conferred such jurisdiction.
2. The conferring of "exclusive" power over the sixteen enumerated heads of S. 92 upon the Provincial Legislatures means that only they can exercise such authority.
3. The delegation of powers by Provincial or Federal authorities to subordinate units, so-called "delegation in depth", was an entirely different matter from that of delegating power to independent and co-ordinate legislative bodies.

1. A.G.N.S. V.A.G. Canada et al (1950) D.L.R. 369.

Rand J. of the Supreme Court of Canada enunciated the interesting doctrine that "delegation implies subordination".¹ Following the principle declared in Hodge V. the Queen, he asserted that both Provinces and Dominion have sovereign authority within their respective fields of jurisdiction and that delegation is an unlawful relinquishing of jurisdiction by the delegating Legislature.

The effect of these decisions was to block another possible device by which the distribution of powers between Provinces and Dominion could be made to correspond with current economic realities. The Supreme Court of Canada, now the final court of appeal in all Canadian cases, will apparently follow the literalistic interpretations of the B.N.A. Act enunciated by the Judicial Committee. It seems furthermore that the argument that "delegation involves subordination" is shaky. Delegation does not mean that the delegating authority abdicates any of its powers but simply elects to exercise them through an agency and has the right to revoke or alter these powers at any time it sees fit. The decisions are indefensible on both legal and economic grounds.²

1. (1950) 4 D.L.R. at p. 385

2. For a critical comment on these decisions see note by John B. Ballim in 28C B.R. pp 79-84 (Can. Bar. Review)

F. Sec. 94 of the British North America Act.

Prof. F.R. Scott has made the interesting suggestion that S. 94 of the British North America Act affords a way through which the powers of the Federal Parliament and the Provincial Legislatures may be redistributed without constitutional amendment.¹ This much-neglected section reads as follows:

"Notwithstanding anything in this Act, the Parliament of Canada may make provision for the Uniformity of all or any of the Laws relative to Property or Civil Rights in Ontario, Nova Scotia and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces and from and after the Passing of any Act in that behalf, the Power of the Parliament of Canada to make Laws in relation to any matter comprised in any such Act, shall, notwithstanding anything in this Act, be unrestricted, but any Act of the Parliament making Provision for such Uniformity, shall not have effect in any Province unless and until it is enacted and adopted as Law by the Legislature thereof."

Since 1902 there has been no attempt to bring this clause of the Constitution into use. The Rowell-Sirois Commission felt that "There is considerable doubt whether the section applies to Provinces other than Ontario, Nova Scotia and New Brunswick."² Prof. Scott concludes by a study of the Quebec Conference and by subsequent utterances of Confederation leaders that S. 94 was meant to apply to all the common law Provinces i.e. all the Provinces except Quebec.

Prof. Scott comes to the conclusion that the Industrial Disputes Investigation Act of 1925³ enacted just after the decision in Toronto Electric Commissioners V. Snider was announced, complied with the conditions of S 94.

1. Section 94 of the British North America Act C.B.R. Vol. XX (1942) pp 525-544

2. Report of Royal Commission on Dominion-Provincial Relations -Vol. II p.73

3. Statutes of Canada 1925 - cap. 14 .

S.1 of the Act declared that the provisions of the Act applied to "any dispute which is within the exclusive legislative jurisdiction of any Province and which by the legislation of the Province is made subject to the provisions of this Act." Within the next few years all of the Provinces enacted legislation applying the terms of the Act to disputes within their exclusive jurisdiction. Prof. Scott concludes that this legislation was intra vires except in the case of Quebec and that, because the power granted to the Dominion under S.94 is not revocable by the Provinces, the British Columbia enactment which later revoked the application of the Act within that Province was ultra vires.¹

Prof. Scott admits that it is very doubtful that any court would accept his interpretation² although I can find no case in which the validity of Dominion legislation has been argued on the basis of S. 94. However, it is desirable that this neglected section receive more discussion by students of constitutional law as a possible way in which the distribution of powers can be altered without amendment of the B.N.A. Act.

G. Evaluation and Suggestions.

It is trite to say that the present constitutional impasse has serious implications for industrial relations in Canada. Although I do not believe that the situation in regard to labour matters is as unsatisfactory as some critics presume it would be folly not to concede that fundamental changes are necessary. It may well prove to be that federalism and the demands of the "garrison state" are incompatible and that the best that can be hoped for is an over-riding Federal jurisdiction over most labour matters with as much decentralization in administration as is feasible.

1. Op. cit. p. 540.

2. Op. cit p. 542.

The division of legislative powers between the national and regional governments in a federal state can be altered by three methods.

- (a) The amendment of the constitution,
- (b) An evolving pattern of judicial decisions in cases involving the division of powers,
- (c) The devising of schemes of federal-regional cooperation within the constitutional framework.

The possibilities inherent in each of these methods will be considered in turn as they relate to present Canadian conditions.

1. Constitutional Amendment

The present position in regard to constitutional amendment is briefly that the Federal Parliament can, by the ordinary legislative procedure, amend the B.N.A. Act in regard to matters which concern the Dominion authority exclusively, while in matters concerning the division of powers between the Federal and Provincial governments, and, seemingly, certain minority rights, amendments must still be made by the Imperial Parliament on a Joint Address by both Houses of the Canadian Parliament.¹ Although it appears certain that Westminster would in no circumstances refuse to enact an amendment requested by the Canadian Parliament, one can be equally certain that the Federal authorities would not venture to so request by purely unilateral action. Although Federal and Provincial authorities have been conferring from time to time, during recent years as to a more satisfactory general amendment procedure I can find no reason to hope that sectional and regional interests will permit success in these ventures. It must also, I believe, be taken for granted that if such a general procedure were adopted there would be a proviso that Quebec should

1. For an exhaustive and scholarly discussion of this whole problem see Constitutional Amendment in Canada by Paul Gerin-Lajoie - U. of T. Press 1950

have power of veto over any specific constitutional amendment.¹

There is, however, some small basis for hope that constitutional amendments to give the Federal authorities more adequate powers over certain aspects of labour matters will be possible.

(a) The Prime Minister, Mr. St. Laurent, has openly rejected the specious "compact theory" to which his predecessors at least paid lip service.² We hope that the concept of the B.N.A. Act as an inviolable contract will soon be so thoroughly discredited that no political leader will dare to advance it upon any pretence. At least we may expect that soon most of those concerned will be able to deal with constitutional problems in a spirit of pragmatism instead of being encumbered with a theory that has no justification in history or in law.

(b) Quebec (and the other Provinces) have unanimously consented to two amendments to the B.N.A. Act which give the Federal Parliament more adequate jurisdiction over pressing economic problems - the amendment adding unemployment insurance to the enumerated heads of S. 91 in 1940 and that giving the Federal Parliament jurisdiction to enact a scheme of contributory old-age pensions in 1951. Thus the constitutional impasse has been breached in two specific cases. It is important to consider the nature of these amendments. Each dealt with a very specific problem, the Provinces in giving their consent had some fairly accurate knowledge of the exact implications

1. It is somewhat disheartening that the proposals of even such an able and moderate French-Canadian as Mr. Gerin-Lajoie are so framed to provide for this veto power.

2. The Government of Canada - R. Mac G. Dawson - U. of T. Press - 1948 p. 147. See Appendix I to Mr. Gerin Lajoie's book for example of the homage paid to the compact theory by Canadian political leaders since Confederation.

of the amendments. Secondly, each amendment transferred jurisdiction to the Federal Parliament over a problem with which the Provinces were quite incapable of dealing in any satisfactory manner. It appears that future amendments concerning labour matters will have these characteristics. The most hopeful approach is, I believe, to work for ad hoc changes, such as an amendment giving the Federal Parliament authority to regulate labour relations in the meat-packing industry,¹ rather than to attempt to secure fundamental changes like the devising of a method of mutual delegation of powers.

The Rowell-Sirois Report² recommended much more sweeping constitutional changes than those I suggest. It would seem that each of these proposals is an utter impossibility at the present time. In particular, delegation, a natural and desirable way over the constitutional hurdle, will require an amendment to the B.N.A. Act and there is no reason to hope that all the Provinces will consent to a change whose precise implications they cannot foresee. Two other recommendations of the Commission are equally impossible for the same reasons and I should like to question even their desirability in the present situation.

(a) The Commission recommended that:

"The Dominion... be empowered to implement any labour conventions of the International Labour Organization." It must be realized that the Report was written against the background of a severe depression. Industrial standards legislation, with which the

1. In this particular case the Federal Parliament could no doubt assume jurisdiction by declaring such works to be for the "general advantage of Canada" under S.92 (10) of the B.N.A. Act. A private Member of Parliament, Mr. Alistair Stewart, has unsuccessfully attempted to have this proposal enacted several times in recent years.- see Hansard 1949 (2nd. Session) pp 375-382. However, I believe that such unilateral action would strain unduly the constitutional framework and that ad hoc amendments are preferable.
2. Recommendation of the Royal Commission on Dominion Provincial Relations Book II p. 49.

I.L.O. Conventions are mainly concerned, was of a very low order, each Province afraid that a progressive policy would inhibit its economic recovery and expansion. The natural remedy to suggest itself was Federal control of industrial standards. The situation is basically different today. Experience has now shown that the Provinces are not inherently incapable of enacting satisfactory industrial standards legislation. It has become evident that the kind of industrial standards legislation a Province has enacted will play a relatively small part in encouraging or discouraging industrial developments within its boundaries.¹ There is also evidence to suggest that at least two of the Provinces feel that the I.L.O. Conventions to some extent bind them.² On the other hand, the record of the Federal Parliament is by no means "lily white" in implementing Conventions which they have ratified and which are within their sphere of jurisdiction.³

1. For an analysis of the "labour in location" theory see Lester - Economics of Labor pp. 516-618
2. Of tremendous potential significance were several enactments of the B.C. Legislature in 1921 giving effect to conventions adopted by the I.L.O. in 1919. These statutes dealt with maternity protection, employment of children, night employment of young persons and women and hours of work. In 1945, the P.E.I. Legislature enacted legislation concerning the minimum age of admission of children to industrial employment to bring the law in that Province into harmony with an I.L.O. Convention of 1937- see Labour Legislation in Canada - 1949 Publication of Federal Dept. of Labour p. 132 and p. 917.
3. The time lag between the passage of a Convention by the I.L.O. and its implementation is particularly illustrated by reference to matters involving merchant seamen. op. cit. p. 32

It is easy for one to come to the conclusion that a problem in which he is vitally interested can be resolved by national or international action. The fact of the matter is, however, that because a matter is of vital concern to more than one nation or more than one Province does not ipso facto imply that it cannot be dealt with in a satisfactory way on a national or a provincial level. If it could be proven that the Provinces were inherently incapable of enacting satisfactory labour legislation there would be an overwhelming argument for transferring jurisdiction over labour matters to the Federal Parliament. As this is not so, I believe that the advantages of decentralization outweigh the advantages of this transfer of authority.

- (b) The Commission also recommended that the Dominion Parliament have authority to enact basic minimum standards concerning hours of labour, wages and age of employment, leaving the Provinces free to enact better standards if they so desired. It is important to note that one of the reasons for this suggestion was to facilitate relief payments by the Dominion. Happily, the relief problem is no longer a major one.

The economic effects of national minima in these fields are complex, unpredictable and outside the scope of this thesis, but there is little doubt that they would constitute a major burden upon marginal producers, particularly in the Maritime Provinces, further aggravating the acute problems of certain firms in certain areas. Again there crops up the old problem in government of statutory minima becoming the normally-accepted standards, perhaps impeding further progress. Although industrial standards, particularly in the Maritimes, are by no means entirely satisfactory,¹ it is perhaps better to hope that Provincial administrations who lag behind in this respect will adjust their legislation as fast as economic conditions within their boundaries permit than to embark upon the road of complexities and difficulties in which Federal control would

1. See the survey of Comparative Industrial Standards in Canada issued by the Dept. of Labour in 1949.

inevitably involve us.¹

2. An Evolving Pattern of Constitutional Interpretation

In the session of Parliament immediately after the General Election of 1949 provisions were enacted to make the Supreme Court of Canada the final court of appeal in all cases arising in Canadian courts, except those cases which were already under way when the Act was passed.²

The question immediately arises as to whether we can expect a new pattern of constitutional interpretation to emerge under the final jurisdiction of the Supreme Court giving the Federal authorities enhanced power to deal with matters with regard to which national action is necessary.

The extent to which the present Supreme Court of Canada is bound by its own previous decisions and in particular those of the Judicial Committee received extended discussion in Parliament when the Supreme Court Act was under debate in 1949³. The Canadian Bar Association had submitted a brief which recommended (among other things) that

"The rule of stare decisis ought to continue to be applied with respect to past decisions of the courts as well as respect to past decisions of the Judicial Committee."⁴

This recommendation would lead one to believe that there was some apprehension on the part of the Bar Association that the Supreme Court of Canada as final court of appeal might launch out on a new and uncharted sea of constitutional interpretation. The Government, however, held the view that the oath which judges took when assuming office bound them to acceptance of the doctrine of stare decisis, that the recommendation would put the Supreme Court of Canada in a

1. The problem of adjusting Federal minimum wages to the divergencies in the cost of living among various regions of Canada would prove particularly acute.
2. Statutes of Canada, 1950, C 37
3. Hansard's Parliamentary Debates 2nd Session 1949 references - various
4. *ibid.* p. 286

legal straitjacket and that its acceptance would imply an unjustified lack of confidence in the Canadian judiciary. One would, I believe, be over-sanguine to expect a sudden volte-face of the Supreme Court to give the Federal Parliament more extensive control over labour matters and certainly the decision involving delegation,¹ one of the first constitutional decisions given by that court as a court of final jurisdiction, would lead one to be very cautious in his hopes. There is little doubt that in spite of the technical question as to whether Canadian courts are still bound by the past decisions of the Judicial Committee most judges would consider it the duties of the appropriate legislatures rather than of the judiciary to make significant changes in the constitutional framework. It is possible of course to argue that certain decisions have exalted what might be called the quasi-federal clauses of the B.N.A. Act,² especially the "trade and commerce"³ and "peace, order, and good government" sections of Section 91, and that it is possible that a new pattern of constitutional interpretation might emerge if these decisions were widely used as precedents. These judgments which exalt the Federal power are, I believe, aberrations from the normal pattern of constitutional development rather than a definable tradition and it would be unrealistic to expect our courts to find in them the basis for the extension of Dominion jurisdiction which recent social and economic developments make necessary.

1. *infra* pp 39-41

2. Russell V. the Queen (1882) 7 A.C. 829 Re Regulation and Control of Radio Broadcasting in Canada (1932) A.C. 304, Reference re Alberta Statutes (1938) S.C.R. 100 and other cases.

3. It is interesting to note that the sweeping powers of the U.S. Congress over labour matters arise from the liberal interpretation given to the "inter-state commerce" clause of the Constitution by the Supreme Court in the last quarter century - Federalism and Labour Relations - A. Cox and M. Seidman - Harvard Law Review - Dec. 1950 pp. 211-245.

3. Federal-Provincial Cooperation within the Present Constitutional Framework

Cooperative Dominion-Provincial action to solve national problems might conceivably take three forms:

- (a) Delegation - as we have seen this is now impossible.¹
- (b) The devising of cooperative schemes for the solution of national problems with each authority legislating for the parts of the program within its sphere of exclusive jurisdiction - Lord Haldane declared in re Weekly Rest in Industrial Undertakings Act.²

"It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provinces together, she is fully equipped."³

However, in 1935 all nine Provinces and the Dominion had co-operated in enacting a marketing scheme for natural products. On reference to the Judicial Committee the Federal legislation was declared ultra vires as an invasion of the exclusive Provincial sphere of "property and civil rights."⁴ Prof. F.R. Scott reasonably commented:

"Thus the courts take the view that even where there is complete co-operation between all Canadian legislatures, each contributing its share of legislative capacity, still the scheme thus established will be destroyed if, perchance, one legislature has made a slip in the wording of its contributory statute and has in fact included some subject matter beyond its jurisdiction."⁵

1. *infra* pp 39-41

2. (1937 1 D.L.R. 695

3. *emphasis mine*

4. For a full discussion of this case and others of the Bennett "New Deal" see the symposium to which the whole of the Canadian Bar Review issue of June, 1937 was devoted.

5. *ibid* p.465

Although the evolution of similar cooperative schemes of legislation in labour matters is logically possible, it is, in practical terms, impossible to frame comprehensive enactments whose validity could satisfy the courts.

A less formal type of Dominion-Provincial and inter-provincial cooperation has emerged in regard to labour matters in recent years. Since 1943 Federal-Provincial Conferences on Farm Labour have taken place with the primary purpose of increasing the mobility between Provinces of seasonal agricultural workers and of framing satisfactory immigration policies on the basis of the need for farm labour. In 1942 the first Conference of Administrators of Labour legislation met and annual conferences have been held ever since. The meetings of the 1950 conference were featured by lectures on subjects as "Labour Relations in Britain Today", "The Organization of a Provincial Labour Department" and "Recent Trends in Collective Bargaining Procedure" along with round table discussion of techniques of conciliation, personnel management, industrial standards etc. Representatives from the Federal Department and the respective Provincial Departments presented the developments in labour legislation that had been made by their respective governments in the preceding year. Although all ten Provinces and the Dominion were represented at the Conference it is notable that Quebec and Ontario had in attendance almost all of their senior labour officers with 22 and 8 delegates respectively, while Alberta and Newfoundland chose to send one official each¹. It is impossible to gauge accurately the effects and potentialities of this form of cooperation. These conferences will at least assure that Federal and Provincial Administrators are not working in vacuo and that the experience of one will be put at the disposal of all.

1. 9th Annual Report of Administrators of Labour Legislation - Montreal, 1950

It can be said in conclusion that, barring a national emergency in which the Federal Government would receive over-riding jurisdiction over labour matters, that the most fruitful approach to labour legislation lies in the unspectacular attempts to secure ad hoc constitutional amendments and in working in informal conferences like those which have been described.

Chapter II

The Status, Liabilities and Privileges of Trade Unions as Defined by the Courts of Law.

A. The Status of Trade Unions

It might be thought that a trade union under ordinary circumstances would be an easily definable entity by its purposes, organization and activities. However in Canada, alone among the major democratic nations, the legal status of most trade unions is obscured by the most intricate of legal subtleties. This section will attempt to define this status as it now exists.

1. Trade Unions Whose Status Is Defined by Statute Law

Federal legislation bearing directly upon the legal status of trade unions, was enacted in the Trade Union Act of 1872. The Act provides for the voluntary registration of a trade union under the Registrar General of Canada upon the application of seven or more of its members. Unions registered under the Act have a quasi-corporate status conferred upon them by Section 18:

"The trustees of any trade union registered under this Act, or any officer who is authorized so to do by the order thereof, may bring or defend, or cause to be brought or defended, any action, suit, prosecution, or complaint, in any court of competent jurisdiction, touching or concerning the property, right or claim to property of the trade union and may, in all cases concerning the property, real or personal, of such trade union, sue and be sued, plead and be impleaded, in any such court, in their proper names, without any other description than the title of their office."

Section 5 of the Act declares in part:

"and this Act shall not apply to any trade union not registered under this Act:

The Trade Union Act has had relatively little success in defining the legal status of trade unions as they have extended their power and influence in Canada:

(a) Relatively few unions have chosen to register under the Act. Since 1872 there have been 117 unions registered. Of these, however, 82 have ceased operations leaving only 25 active to date.¹

(b) The constitutional validity of the Act has been doubted or denied in several cases before the courts as an encroachment upon the exclusive jurisdiction of the Provinces over property and civil rights.² However, the Manitoba Court of Appeal in Chase et al V. Starr came to the interesting and dubious conclusion that S. 18 applied to all trade unions registered and un-registered.³

Quebec has gone much further than other Provinces in giving statutory definition to the status of trade unions:

(a) The Professional Syndicates Act⁴ enacted in 1925 provides for the voluntary incorporation of "twenty or more persons engaged in the same profession, the same employment or in similar trades." Section 6 of the Act declares:

"Professional syndicates may appear before the courts and acquireproperty suited to their particular objects."

(b) The Collective Agreements Extension Act⁵ enacted in 1934 provides that a "parity committee" shall be set up to administer any collective agreements rendered obligatory shall "constitute a corporation and shall have the general powers, rights and privileges appertaining to ordinary civil corporations." The Catholic trade union movement has not shared the hostility to the incorporation of trade unions that has characterized other labour organizations in Canada⁶ and the

1. Private letter from the Department to the Secretary of State for Canada dated July 7, 1951
2. Clay Products Workers' Union V. Dominion Fire Brick and Clay Products Ltd. (1946) 3 W.W.R. 798; Polakoff V. Winters Garment Co., (1928) 2 D.L.R. 277, and Starr V. Chase, (1924) S.C.R. 495
3. Chase et al V. Starr (1923) 1 W.W.R. 1393. This decision was reversed by the Supreme Court of Canada under sub. nom. Starr V. Chase - see above
4. Revised Statutes of Quebec, 1941 C. 162.
5. ibid. C 163 See also *infra* p. 97-98.
6. Logan - pp. 423-424

Confederation of Catholic Workers chose to be incorporated in 1947.¹

The statute law of British Columbia has been held by the courts to have given trade unions in that Province some of the duties and privileges of legal entities:

- (a) It has been laid down by the British Columbia Court of Appeal that trade unions in that Province have been made liable for suits in tort under Section 2 of the Trade Union Act which declares:

"No Trade union nor any association of workmen or employees in the Province, nor the trustees of any such trade union or association in their representative capacity, shall be liable in damages for any wrongful act of omission or commission in connection with any strike, lockout or trade or labour dispute, unless the members of such trade union.. .. or its council, committee or other governing body, acting within the authority or jurisdiction given such council committee or other governing body.....have authorized or have been a concurring body in such wrongful act."²

- (b) Two very recent decisions of the British Columbia Court of Appeal are significant in their enunciation of the principle that trade unions certified as bargaining agents under the Industrial Conciliation and Arbitration Act of that Province have been thus endowed by the Legislature with the status and responsibilities of legal entities and become at law bodies apart from their individual members.

1. Labour Legislation as Existing in Canada on Dec. 31, 1948 - P. 323 n.
2. Emphasis mine.

In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Local Union No. 1¹
 the Court argued from sections 34-38 of the Act, which impose certain responsibilities and privileges upon trade unions certified under the Act, that any union so certified was a persona juridica. This principle was followed in Vancouver Machinery V. United Steel Workers of America.² Mr. Crysler concludes:

"As trade unions, whether registered or unregistered, are in fact acting as legal entities in the course of collective bargaining, it is inevitable that they take on the attributes of a quasi-corporation. It is unavoidable to subscribe to them a legal status correctly related to the facts of their operation."³

An amendment to the Alberta Labour Act was enacted in 1948 to make unions liable for illegal strikes. The amendment reads;

"In any case where a judge has certified to the Minister that a strike is illegal any trade union or employees' association, any of the members of which have participated in the illegal strike, is guilty of an offence and is liable on summary conviction to a fine not exceeding one dollar for each person participating in the strike for each day or part of a day that a strike exists after the third day....following the adjudication by the judge that the strike is an illegal strike."⁴

A further section goes on to add that this penalty shall apply only to a local union or branch whose members are on strike illegally and shall not apply to any other local of the same union whose employees have not participated in such unlawful activity. These amendments are among the most unfortunate clauses in extant Canadian labour legislation. They make any local vulnerable to the unauthorized actions of its members and provide a method whereby a determined minority within a local can destroy such union. It is to be

1. (1947) 4 D.L.R. 159 (B.C.C.A.)

2. (1948) 2 W.W.R. 480 (B.C.C.A.)

3. Labour Relations and Precedents in Canada pp.37-38

4. 1948 Status of Alberta C 76 S 82 C. (1). Emphasis mine.

hoped that the Alberta Legislature will see fit to amend this unfortunate legislation as soon as possible.

Enactments of the Saskatchewan and Ontario Legislatures in 1944 defined the legal status of trade unions at least in a negative way. The relevant sections of the Saskatchewan Trade Union Act¹ of that year read:

"21 A. trade union shall not be made a party to any action in any court unless such trade union may be made a party irrespective of any of the provisions of this Act.

22. A collective bargaining agreement shall not be the subject of any action in any court unless such collective bargaining agreement might be the subject of such action irrespective of any of the provisions of this Act."

The Ontario legislation² is framed in almost identical language.

In conclusion, it must be emphasized that the Crown may bring prosecutions against any trade union for infringements of the Criminal Law as if the union were a legal entity.³

2. Trade Unions Whose Status is not Defined by Statute Law

Apart from the statutes that have been discussed, the problem of the legal status of trade unions is a quagmire. On several occasions Canadian judges have expressed their confusion in this regard. Idington J. of the Supreme Court of Manitoba in Williams et al V. Local Union 1562 United Mine Workers⁴ said this:

"The party (i.e. the respondent trade union) that says it is not a legal entity had the courage to proceed as if it were while saying it was not".

In a more recent case⁵ Martin C.J.S. of the Saskatchewan Court of Appeal confessed a similar puzzlement:

1. 1944 (2nd session) Statutes of Saskatchewan C. 69

2. 1944 Statutes of Ontario C 54 S 3 (2) and (3)

3. Chase V. Starr (1924) S.C.R. 495.

4. (1919) 3 W.W.R. 828 at p. 831

5. Clay Products Workers' Union V. Dominion Fire Brick and Clay Products Ltd. (1946) 3 W.W.R. 798 at pp 806-807.

"The position taken by the counsel for the union is incongruous, he asks the Court to extend the time to enable the union to appeal and at the same time argues that the union is a nonentity; he seeks for the union all the benefits extended to persons and bodies corporate or politic in courts of law and at the same time is not prepared to assume any of the responsibilities for he argues that costs cannot be ordered against the union."

What then is a trade union at common law ? The classic definition given in the Taff Vale Case has been widely accepted in Canadian courts:

"while under the prevailing policy our legislature gives to unincorporated labour organizations a large measure of protection, they have no legal existence; they are not endowed with any distinct personality; they constitute merely collectivities of persons. The acts of such an organization are merely the acts of its members."¹

Can a Canadian union apart from statute law sue or be sued in its own name ?

Judicial precedents in this regard are, to put it mildly, confusing, although in most circumstances it would seem that the answer is in the negative. Some of the leading cases will be discussed briefly:

(a) In Krug Furniture Co. V. Berlin Union of Amalgamated Woodworkers²

before the Ontario High Court of Justice an action was brought against the defendants for "wrongfully and maliciously" inducing the plaintiff's employees to break their contracts with him. In answer to union counsel's contention that the action should be dismissed because the defendant union was not an incorporated body the Court held that "this is but a technical objection" and that "no encouragement should be given to any organized body to evade the

1. (1901) A.C. 426 at p. 428

2. (1903) 5 O.L.R. 463

consequences of its act by abstaining from obtaining corporate capacity or other legal existence."

In Hay V. Local Union No. 25 Ontario Bricklayers' and Masons' International Union¹ the First Divisional Court of Ontario and the Supreme Court of Canada respectively held that civil actions against unregistered unions could not be maintained.

(b) Two interesting and divergent Canadian decisions have been made against the background of the House of Lords judgment in Russell V. Amalgamated Society of Carpenters and Joiners² which held that the defendant trade union was an illegal association chiefly because of the restrictions upon conduct to which members were required to assent. These regulations were typical of those enforced by most unions. In Chase V. Starr³ before the Manitoba Kings' Bench action was brought by two officials of the Canadian division of the International Brotherhood of Locomotive Engineers, an unregistered trade union, against the former secretary-treasurer of that organization to surrender certain of the union's funds in his possession. Defense counsel argued that the union could not be a party to a suit because it was an illegal organization in restraint of trade and the Court dismissed the action relying on the Russell case as precedent. In an appeal to the Manitoba Court of Appeal this decision was reversed.⁴ As noted above,⁵ it was decided that the Trade Union Act of 1872 applied to all unions. Furthermore, through an examination of Dominion and Provincial statutes relating to collective bargaining and by an analysis of the by-laws of the union,

1. 63 O.L.R. 418, (1929) 2 D.L.R. 336

2. (1912) A.C. 421

3. (1923) 2 D.L.R. 1112

4. Chase et al V. Starr (1923) 4 D.L.R. 103

5. infra p. 56

the Court decided that governmental policy had for many years been one of encouraging collective bargaining and that this policy would be frustrated if every union was at the mercy of its officials so far as the security of its funds was concerned. The Supreme Court of Canada affirmed this decision and dismissed the defendant's appeal with costs.¹

A much different use of the precedent established in the Russell case was made by the Supreme Court of Canada in Polakoff V. Winters Garment Co. In this case action was brought by the International Ladies' Garment Workers' Union against an incorporated employers' association to enforce a written collective agreement. Raney J., speaking for the majority of the Court, reviewed in detail the history of the doctrine that militant trade unions were illegal as being in unreasonable restraint of trade and so contrary to "public policy" as declared in the Russell case. He declared that this doctrine was not founded upon any "well-recognized principles of common law" but upon "principles of political economy which were at the time the doctrines were first promulgated, as they are still in keen controversy".² He asserted that the doctrine of the illegality of militant trade unions as being contrary to public policy had come into the common law as late as 1855 in Hilton V. Eckersley. Although he felt that this doctrine was an unjustified invasion of the legislative sphere by the courts, he declared the Court to be bound by the precedent established by the Lords in the Russell case. Thus the union was declared an illegal organization incapable because of its illegality to maintain a civil action.

(c) A recent case before the Ontario High Court of Justice again resulted in that Court relying on the classic definition of a trade union in the Taff Vale Case.³ In Canadian Seamens' Union V. Canada Labour Relations

1. Chase V. Starr (1924) S.C.R. 495

2. op. cit. p. 280

3. infra p. 60

Board and Branch Lines Limited ¹ an unregistered union applied to the Court for an order to quash the order of the Canada Labour Relations Board revoking the union's certification.² The Board had acted on the evidence of a British White Paper that the labour organization was no longer a "trade union" within the provisions of the Industrial Relations and Disputes Investigation Act. The Court dismissed the application on the grounds that a union was merely "a collection of persons" and as such had no right to bring such an application.

Are collective agreements between unions and employers enforceable as contracts in courts of law ? This question is of course logically inseparable from the previous ones and the status of collective agreements is dependent upon the status of those who enter into them. Again, the judicial precedents are contradictory:

- (a) In Caven V. Canadian Pacific Railway ³ plaintiff brought suit against the C.P.R. for damages for improper dismissal allegedly in contravention of a collective agreement between the railway company and its workers. Justice Walsh for the Alberta Supreme Court took the position that such an agreement was not legally tenable, although under common law principles it was held that the plaintiff had been illegally dismissed and he was awarded \$10,000 damages. However in successive appeals to the Appellate Division of the Alberta Supreme Court and to the Judicial Committee of the Privy Council both these bodies based their decisions on the assumption that the agreement was legally enforceable and directed their attention chiefly to the plaintiff's

1. Labour Gazette - May 1951 pp 697-698
2. Although I can find no fuller report of this case than that in the Labour Gazette, I presume that the Board decertified the union because it had become a revolutionary organization and was thus not a "trade union" within the terms of the Industrial Relations and Disputes Investigation Act. The C.S.U. has had left-wing leadership for some time (Logan pp. 287-289) and in 1949-50 its disputes with Great Lakes shipping operators led to sympathetic strikes of seamen and dockers as far afield as Liverpool, England and Sydney, Australia.
3. (1924) 3 D.L.R. 783 - for discussion of this case and others involving the legal status of trade unions in Canada see Trade Unions In Canada Part 1 - C.A. Pearce Vol. X (1932) C.B.R. pp. 349-360

compliance with the agreement.

- (b) Decisions before the Manitoba King's Bench, the Manitoba Court of Appeal and the Judicial Committee of the Privy Council in Young V. Canadian Northern Railway¹ seem clearly to reverse those in the Caven case. The former dispute involved the allegedly wrongful dismissal of a railway employee under the terms of a collective agreement negotiated by a union of which the plaintiff was not a member. The judgments of all three courts indicated that a collective agreement was not a contract binding at law. In the Manitoba Kings' Bench Dysart J. quoted with approval decisions of several American courts in similar cases one of which read in part:

"The rule seems to be that individual members of a trade union are not bound by contracts between the union and employers unless such agreements are ratified by members of the union as individuals and that in the absence of such ratification by a member, no rights accrue to him which he can enforce against an employer."²

The Manitoba Court of Appeals concurred in this judgment. Justice Fullerton concluding that the collective agreement was not a contract because of its "lack of mutuality" said:

"I am satisfied that so-called wage agreements between workmens' unions and employers are never intended by the parties to be legally enforceable contracts..... If employers do not live up to the terms of their agreements the workmen may apply for a Board of Investigation and Conciliation under the Industrial Disputes Investigation Act..... and failing a satisfactory adjustment may go on strike."³

1. (1929) 4 D.L.R. 452, (1930) 3 D.L.R. 352, and (1931) A.C. 83

2. (1929) 4 D.L.R. 452 at p. 465

3. (1930) 3 D.L.R. 352 at pp. 356-357

The Judicial Committee of the Privy Council concurred in this significant declaration that the ultimate remedy of workers for breach of a collective agreement was a strike rather than civil action for damages.¹

3. Trade Unions and Representative Actions

It has been authoritatively decided that trade union can lawfully participate in a representative action through its officials. In the Taff Vale case Lord Macnaghten declared:

" I have no doubt whatever that a trade union, whether registered or unregistered may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body."²

This position has been followed in several Canadian cases in suits by or against trade unions.³

4. The Legal Status of Trade Unions in Other Democratic Nations.

United States courts have been more ready than those in Canada to consider collective agreements between unions and employers as binding contracts. Some years ago an American observer commented thus upon the changing attitude of the judiciary in his country:

"Certainly the fears of older labor leaders that judicial control over them would be used by the courts as a weapon for the oppression of labor have proved unfounded. Such a record....as is available reveals that labor rather than the employer has been the chief beneficiary of judicial intervention. Such limitations as the courts have placed upon the effective function of collective agreements seem not the result of economic prepossessions but rather of blunders committed by judges within

1. (1931) A.C. 83

2. (1901) A.C. 426 at p. 428

3. Metallic Roofing Co. V. Local No. 30 Amalgamated Sheet Metal Workers' International Ass'n. (1905), 9 O.L.R. 171, Local Union No. 1562 United Mine Workers of America V. Williams and Rees, 59 S.C.R. 240, Clay Products Workers Union V. Dom. Fire Brick and Clay Products, Ltd., (1947) 1 D.L.R. 378 (Sask. C.A.) and other cases.

the grip of concepts derived from the law of private contract".¹

The Labor Management Relations (Taft-Hartley) Act enacted by Congress in 1947 declared that suits for breaches of collective bargaining agreements negotiated by employers and unions in business "affecting commerce" can be maintained in Federal courts.² In such a suit a union is to be treated as a legal entity apart from its members and it is provided that any judgment against it is to be settled from union assets only. It is also provided that a union is legally bound by the acts of its agents.

In the 1930's France, Belgium and the Netherlands enacted legislation similar to the Labour Agreements Extension Act of Quebec³ by which the terms of collective agreements entered into by representative or majority groups in an industry might be made legally binding upon all persons in the industry or in a particular region.⁴

The legal enforceability of the awards of arbitration courts has been a normal feature of industrial relations in Sweden, Australia and New Zealand for many years.⁵ In Britain emergency war-time legislation which makes awards of the National Arbitration Tribunal binding on both parties is still in effect.⁶

5. Summary and Conclusions

Apart from Quebec, and perhaps British Columbia, the legal status of trade unions, especially as it relates to the enforceability of collective agreements, is more confused in Canada than in any other democratic nation.

The solution suggested by many involves the compulsory incorporation of trade unions. It is argued that business incorporates and is financially

1. The Present Status of Collective Agreements (note) Harvard Law Review Vol. 51 (1938) p. 520
2. For a full discussion of this legislation see "The Labor Management Relations Act" - Archibald Cox - Harvard Law Review Vol. 61 (1948) pp.274-315
3. infra p. 97
4. Economics of Labor R.A. Lester pp.724-725
5. ibid. p. 725
6. Britain 1950-51 - Central Office of Information p. 170

responsible for any damages it commits and that unions should be compelled to undertake similar obligations.

Canadian labor organizations, apart from the Catholic trade union movement, have always opposed compulsory incorporation. It is argued that the purpose of the incorporation of business is to limit liability, that of the incorporation of labor unions to extend it. Labor spokesmen feel that a hostile political regime might impede the rights of workers to organize by refusing or delaying their charters of organization into unions. Also it is argued that a government might restrict normal union activities by refusing to include such activities within the provisions of the union's charter and that judges might break a strike at any time by deciding that the striking union had contravened some provision of its charter and by thus cancelling or suspending its activities.¹

The real case against the compulsory incorporation of labor organizations rests on the doubtful practicability of its workings.²

(a) Should only the national union be incorporated or should each local be incorporated? If various locals incorporate under Provincial laws and the national incorporates under Federal legislation, legal complications appear certain to arise. It appears constitutionally impossible for all unions to be incorporated under Federal enactments.³ This dilemma seems logically insoluble.

(b) Should mere membership in a union whose agents enter into a collective agreement entail a legal obligation to abide by the terms of this agreement?

1. For a thoughtful discussion of the incorporation of unions see Survey of Labor Economics - Florence Peterson - Harpers and Bros. - 1947 - pp.642-44
2. The premise upon which I consider these difficulties is that collective bargaining rather than any form of compulsory arbitration should be the way in which conflicts of interests between employers and workers are reconciled.
3. *infra* p. 56

(c) Is it possible to safeguard local and national unions from suits arising out of unauthorized acts of its members or officials ? ¹

(d) Should workers who are employed under conditions established by collective agreements but who are not members of the contracting union have rights and obligations under the agreement ?

(e) If a majority of members of an incorporated union desired to change its affiliation, would it not be possible for a minority to continue under the old charter and retain the unions funds and property ?

In general, it appears to be a sound principle to discourage litigation involving the respective rights and obligations of parties to a collective labour agreement:

(a) Almost any comprehensive collective agreement involves clauses which can be interpreted intelligently only by those who have a first-hand knowledge of the particular occupations or industry.

(b) The application of individualistic common law concepts to industrial relations results in absurd decisions in the light of modern economic realities.

(c) Workers in general believe, with some justification, that the judiciary has a pro-management bias. This distrust with which employees and labour leaders regard the courts makes judges unsuitable for the role of arbitrators in industrial disputes.

(d) Litigation is a slow and costly process. In both these respects labour unions are at a positive disadvantage vis-a-vis employers.

(e) In many industries and businesses where a moderate degree of confidence between workers and management prevails industrial peace is aided by informal but mutually-understood conditions of employment. The incorpo-

1. Much of the hostility of union leaders to incorporation revolves around this point. The most valid objection to the Taff-Vale judgment was that the national union was held responsible financially for unauthorized acts of some of its members.

ation of labour unions in these circumstances might no doubt lead to a legalistic attitude in union-management relations which would impair mutual confidence.

The compulsory incorporation of labour unions is not a practical alternative to the confusion that now surrounds the legal status of unincorporated trade unions in Canada. This problem appears to have no solution. I should suggest that legislation be enacted by the Provincial Legislatures and the Federal Parliament providing that in industries within their respective spheres of jurisdiction the courts be given the power to enforce collective agreements in situations where such agreements contain clauses specifically stating that any disputes arising out of breaches shall be decided by the judiciary. It can of course be argued in objection to this proposal that unions who desire that agreements into which they enter be legally enforceable can attain this end by incorporation under the Federal Trade Union Act. However, few unions have desired to buy "a pig in a poke", to incorporate themselves without knowing just what kind of suits may be brought against them at some future date. It may well prove to be true that in a few instances where there has been a lack of understanding between unions and management that the reduction of mutual rights and obligations to an agreement enforceable at law will better industrial relations. This mild proposal leaves some of the difficulties I have brought up earlier unsolved but beyond it I see no solution to the unfortunate situation that now exists.

B. Trade Unions and the Law of Criminal Conspiracy

The most bitter battle in the struggle of British trade unions for existence was that against decisions of common law courts which declared that combinations of workmen were as such criminal conspiracies in restraint of trade.¹ It is not necessary here to examine the social philosophy underlying these decision except to remark that it was a natural reaction of those who had an unbounded faith in the efficacy of unregulated competition to growth of economic organizations which were frankly and inherently monopolistic in nature.

The doctrine of criminal conspiracy was first brought forcibly to the attention of Canadian labour as a result of prosecutions in the Toronto Printers' Strike of 1872.² Workers were alarmed to discover that trade unions were in fact illegal organizations under the Combination Acts of 1792-1800 which had been repealed in Britain in 1824 but which still applied to Canada and that Gladstone's famous Trade Union Act of 1871 which had legalized trade unions in the Motherland had no application to the young Dominion. The outcome was the passage of a bill introduced by Sir John A. Macdonald in 1872 which almost exactly duplicated the British Act of the previous year. S.32 of the Canadian Act reads:

"The purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust."³

However, this exemption applied only to unions registered under the Act.

In 1892 the Criminal Code was amended to read:

"496. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

1. History of the British Working Class Movement 1789-1947-G.D.H. Cole London, 1948

2. Logan - pp.38-43.

3. Revised Statutes of Canada 1927-G 125

497. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section"¹

Section 498 of the Criminal Code reads in part:

"Every one is guilty of an indictable offence....who conspires, combines, agrees or arranges with any other person...

(a) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(b) To restrain or injure trade or commerce in relation to any such article or commodity, or

(c) To unduly prevent, limit, or lessen the manufacture or production of any article or commodity or to unreasonably enhance the price thereof",

(d)....

(2) Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as workmen or employees".²

A section of the Combines Investigation Act exempts trade unions from criminal prosecution as combines operating to the detriment of the public interest in terms similar to S. 498 (2) of the Criminal Code.³

S. 499 of the Criminal Code makes it an indictable offense for anyone to break wilfully a contract which he has reasonable cause to believe will "endanger human life or cause serious bodily harm" by

1. Revised Statutes of Canada, 1927, C.146

2. R. S.C. 1927, C. 146

3. R.S.C. 1927 C. 26, S 4

interrupting the operation of such public utilities as railroads, electric light, water, gas or power services. It is further declared immaterial whether any such offense is committed out of malice or not.¹

Criminal cases involving conspiracy in restraint of trade have come for the most part under S. 498 (2) of the Criminal Code. Courts of law have been called upon to decide whether or not combinations of workmen or employees have gone beyond "their own reasonable protection" and thus become conspiracies in restraint of trade. The essential factor in determining legality or illegality in each case is the purpose of the combine or combination.

The decision of the Manitoba Court of Appeal in the case of R. V. Russell² is significant for the principles it laid down regarding the limits of the exemption of trade unions from criminal prosecutions for conspiracy. The case in point arose out of the actions of one of the leaders of the Winnipeg General Strike of 1919.³ Defense counsel argued that the accused was not guilty of participating in a criminal conspiracy because of the protection against such prosecutions by Sections 2 (38) and 590 of the Criminal Code. S.2 (38) reads as follows

"Trade combination means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any masters or workmen in or in respect of his business or employment or contract of employment".

S. 590 states:

"No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any act or causing any act to be done for the purpose of a trade combination unless such act is an offense punishable by statute"

1. Revised Statutes of Canada, 1927 C. 146.

2. 51 D.L.R. 1

3. see Master's book

The accused was convicted by the court of seditious conspiracy and the principles stated by Cameron, J.A. and Perdue, C.J. can be summarized briefly:

1. Sympathetic strikes are unlawful. If a strike involves no trade dispute between the strikers and their employers and is not the outgrowth of relations between the employer and his employees the strike is not justified and is thus unlawful.
2. The protection afforded to workers under S. 38(2) and S. 590 of the Criminal Code does not cover strikes whose purpose is revolution and the overthrow by force of the existing form of government in Canada.
3. It is lawful to strike for higher wages. Cameron J.A. stated "as long as a strike is for a legitimate purpose, such as, for instance, advancing the rate of wages, the fact that injury results to the employer does not thereby alter the character of the act.....The employer may suffer loss or be financially ruined but under the law as it is, our Courts of Justice are impotent to give him a remedy.....A combination to quit work is lawful where its purpose is to obtain for the parties a benefit they can lawfully claim."¹
4. The protection given to workers by S. 38(2) and S. 590 does not extend to situations in which the object of a combination is not to secure something to which its members have no lawful right. "If the primary object (of a combination) is to injure others in their business of calling, or to deprive them of their liberty of action without just cause, and not to advance the interest of the combination, except perhaps in some remote and indirect way, it is unlawful."²

1. op. cit. p. 17

2. op. cit.

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There have been several other Canadian cases which staked out the limits of exemption from prosecutions against criminal conspiracy that trade unions enjoy. In each case the determining factor of legality or illegality is the purpose of the combination.

1. A combination not to work is lawful but a combination to prevent others from working by such means as a sit-down strike is unlawful. In Johnson V. McKay¹ officers of a mineworkers' union had combined by a strike, picketing and a threat to withdraw maintenance men from a mine in breach of contract to compel the mine-owners to discharge workers of another union with which the management had a contract of employment. The accused were found to have been guilty of actionable intimidation. It is of course unlawful under most conditions to conspire to commit a breach of contract or to advise others to do so.
2. The fact that a trade union organization requires that one member does not take the place of another when a legal strike is on and arranges a scheme of strike pay does not make it an illegal combination.²
3. An individual may cease to work for an employer and any number of men may as a group act in the same manner provided the purpose is mutual benefit and no unlawful means are used to carry out their objects.³
4. It is not criminal conspiracy for union members to refuse to admit other workers to their union so long as the purpose can be shown to be the attainment of a lawful object even though the persons who have been refused membership lose their jobs

1. (1937) 1 D.L.R. 443

2. Chase V. Starr (1923) 3 W.W.R. 500

3. International Ladies' Garment Workers Union V. Rother (1923) 3 D.L.R. 768

In general, Canadian courts have given a fairly broad interpretation of the clauses in the Criminal Code exempting unions from prosecutions for criminal conspiracy so far as such actions arise out of relations between a particular employer and his workers. On the other hand the judiciary has consistently refused to recognize any such concept as the legitimacy of working-class solidarity or that one group has any lawful right to interfere in relations between other workers and their employers.

It is, I believe, unfortunate that boycotts and sympathetic strikes are illegal at common law and I should suggest that this condition be rectified by legislation of the Provinces and the Dominion:

- (a) In situations where workers in an industry are divided into several craft unions no one union may be able to exert decisive economic pressure against an employer or employers if other workers are not allowed to come to the aid of those on strike.
- (b) It is possible for employer groups to use the weapon of the boycott against workers and against the products of other firms of whose policy they do not approve, and to make illegal the boycott and the secondary strike by which workers puts management at an unjustifiable advantage vis-a-vis workers. No law could be enforced which prohibited employer pressure similar in effect to the sympathetic strike or boycott. It is no secret that certain employees can be and have been blacklisted by employers' groups in spite of S. 502 A of the Criminal Code. Rather obviously, similar economic devices used by labour unions become imm-

mediately apparent and are within the purview of the courts.

- (c) The situation as it now exists puts the responsibility for making the decision as to whether a strike is in the pursuance of the legitimate self-interest of workers or no in the hands of the courts, who, it is respectfully submitted, are less capable of determining this matter than are the unions themselves. A union which engages in a boycott or a sympathetic strike will do so only if it feels that the interests of its own members are involved in the outcome of some labour dispute between another group of workers and their employers. Surely these workers are better able to decide this matter in almost any conceivable situation than are judges whose social background is usually closer to that of management than that of labour and who are nourished on the individualistic concepts of the common law. To follow to its logical conclusion the principle that workers can lawfully exert pressure against employers within the prohibitions of statute law if their object can be shown to be something that they have a lawful right to attain, it must be admitted that sympathetic strikes and boycotts should not be declared illegal. It should be decided by the legislatures rather than the judiciary whether solidarity of workmen within an industry or a region or throughout the nation is a legitimate interest of individual unions and I believe that a reasonable answer to this question will be in the affirmative.

It may be said in conclusion that we in Canada can afford to rely at present upon the good sense of the trade union movement in keeping sympathetic strikes and secondary boycotts at a minimum. Responsible labour leaders are no doubt aware the widespread use of such devices

would quickly bring down the public ire and subsequent repressive legislation upon their heads. In the meantime we are unjustified in denying to them the privilege of resort to secondary pressures when they feel that the situation warrants it.

C. Trade Unions and the Law of Civil Conspiracy in Restraint of Trade

Although it is impossible to separate completely the principles of law relating to civil and criminal conspiracy in restraint of trade it is convenient to separate them for purposes of analysis. Under the B.N.A. Act the Dominion has exclusive legislative powers over the Criminal Law while "Property and Civil Rights" are matters of exclusive Provincial jurisdiction. The Legislatures of Saskatchewan, Alberta and Ontario have each enacted similar provisions declaring:

"A trade union and the acts thereof shall not be deemed unlawful by reason only that one or more of its objects are in restraint of trade".¹

The Ontario and Saskatchewan enactments go on to assert that any act done by two or more members of a trade union in "contemplation or furtherance of a trade dispute" shall not be actionable unless the act done were actionable in the absence of a combination.²

Canadian Courts in dealing with criminal and civil cases of conspiracy in restraint of trade have leaned heavily on the "United Kingdom Trilogy" from which several principles relating to combinations have emerged.³ Mr. Crysler has listed these basic elements:⁴

- "1. Interference with contractual relations without justification constitutes the violation of a legal right.
2. The use of unlawful means such as compulsion, intimidation or threats to obstruct or interfere with a person in the exercise of his trade, profession or calling or to prevent others from entering into or continuing contracts within him constitutes a violation of a legal right.

1. Statutes of Ontario, 1944-46 C. 54 S.2. similar provisions Statutes of Alberta 1947 C.58 and Statutes of Saskatchewan 1944-45 C.19

2. ibid. C.54 S. 3 (1) and C. 69 S. 20

3. Allen V. Flood, Quinn V. Leathem and Sorrell V. Smith-

for a full and critical discussion see Labor and the Law - Gregory

4. Crysler - p. 14

3. A person has not a cause of action because of having suffered damages where the party causing the damage, without using unlawful means, induces others not to enter into or continue a contract with such person.
4. A lawful act does not become unlawful because done with an intent to injure but an act otherwise lawful becomes unlawful if done by two or more persons with intent to injure another and not with the intent of furthering their own trade interests.
5.it is not necessary for the plaintiff to prove malice in the sense of spite or ill-will in cases of violation of legal rights referred to in (1) and (2)".

The principles of the "Trilogy" have been clarified in several cases before Canadian courts.

1. An agreement between a trade union and an employer which discriminates against certain members is a lawful act carried out by lawful means if it can be shown that the union's predominant purpose is the furtherance of the interest of its members.¹
2. Workers may lawfully combine to refuse to admit a person to union membership if there is an absence of malicious intention. In Graham V. Bricklayers' and Masons' Union² a union had refused to admit the plaintiff to membership and had threatened to strike if his employer continued to employ him. It was held that the union was pursuing a lawful object by lawful means and that its conduct was therefore not actionable.
3. A combination to have a workman discharged or prevent his re-employment is actionable, if done without justification.³
4. In general if a combination contravenes provisions of the Criminal Code in advancing its own interests its conduct is action-

1. Corbett V. Can. Nat'l. Printing Trades Union, (1943) 4 D.L.R. 441

2. 9 W.L.R. 475

3. Thompson V. Ryall and Cunningham (1924) 4 D.L.R. 778 (Man.)

able.

5. A combination to induce a breach of contract is unlawful and the object of the persons, so combining is immaterial as a defence.¹

In summary, the activities of a combination are actionable if

1. lawful means are used to further an unlawful end,
2. unlawful means are used to further a lawful end,
3. unlawful means are used to further an unlawful end.

It may be concluded that the same suggestions as have been made in respect to criminal conspiracy² would be applicable here. The definition of what constitutes a "lawful end" should be made by the Legislatures rather than the courts and that the scope of what constitutes lawful activities of trade unions through secondary pressures should be expanded by statute.

1. Cotter V. Osborne (1908), 8 W.L.R. 451 and Fokuhl V. Raymond (1948) 3 D.L.R. R. 11
2. *infra* pp. 75-77

D.

Picketing

It must be admitted at the outset that it is impossible for the layman to make an adequate analysis of the law relating to picketing as it exists in Canada.¹ This fact alone indicates the need for further statutory definition of the limits within which this form of economic activity may lawfully be carried on. This section will be concerned merely with pointing out some of the more obvious difficulties which arise when the common law concepts of a laissez-faire society are applied to modern industrial conflict and to suggest a possible reform of the situation as it now exists.

Picketing has been defined as "watching or spying or establishing a system of watching and surveillance, of propaganda, or practices and manoeuvres with a view to rendering effective the boycotting of an industrial establishment by preventing the continuance of work."² Picketing has three objects; to inform those otherwise unaware that there is a strike in a particular firm, to persuade workers to join the strike and to by persuasion, or in some cases more forcible means to prevent non-striking persons from going to work in the establishment in which the strike is being held.³

As both Canadian judicial decisions and Canadian legislation have been affected directly by British statute and common law it is necessary to outline briefly the legal position as it has evolved in England. After a series of decisions restrictive of trade union activity the

1. The basic references for this section are; The Law of Picketing in Canada, I and II, Jacob Finkleman, U. of T. Law Journal, Vol. 2 pp. 67-102 and 344-360; Labour Law: 1923-1947, Bora Laskin XXVI C.B.R. pp. 289-299; Picketing, 57 Canadian Criminal Cases pp. 1-81; and A.C. Crysler, Labour Relations and Precedents pp. 27-32.
2. Crysler p. 29
3. Encyclopedia of the Social Sciences - 1934 Vo. XIV p. 22 quoted in Finkleman op. cit. p. 68.

Conspiracy and Protection of Property Act¹ was enacted in 1875 one section of which read;

"Attending at or near the house or place where a person resides, or works, or carries on business or happens to be, or the approach to such house or place in order merely to obtain or to communicate information, shall not be deemed a watching or besetting within the meaning of this sections."

This section freed trade unions from the last vestige of the criminal law which applied special liabilities upon labour. Employers then began to bring civil actions against unions but attention was not focused on this situation till the famous judgment of the House of Lords in the Taff-Vale Case.² In 1906 the Liberal Government was forced to yield to the pressure of the trade unions and their much-augmented representation in Parliament by enacting legislation of a positive nature assuring workers the right to picket peacefully. S.2 of the Trades Disputes Act³ reads as follows;

"(1) It shall be lawful for one or more persons acting in their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working."

In 1927 as a result of the General strike of the previous year the Trade Disputes and Trade Unions Act⁴ was enacted which substantially curtailed the privileges of labour, including the right to picket peacefully.

This Act was repealed in 1945.

1. 38 and 39 Victoria C. 86

2. Taff-Vale Railway Company V. Amalgamated Society of Railway Servants (1901) A.C. 426

3. 6 Ed. VII C. 47

4. 17 and 18 Geo. V., C 22

The two leading, and seemingly contradictory, cases which have contributed most to the Canadian law of picketing were both decided before the enactment of the Trades Disputes Act of 1906 when the Canadian Statute Law was substantially the same as that of Britain. The implication of Lyons V. Wilkins¹ was that peaceful picketing was ipso facto a nuisance at common law. A contradictory decision was rendered by a court of coordinate jurisdiction in Ward, Lock and Company (Limited) V. Operative Printers' Assistants' Society² when it was laid down that picketing per se was a criminal offense only in cases in which a civil remedy for tort existed. As Prof. Finkelman pointed out, most Canadian cases prior to 1934 were decided on the basis of the earlier and more restrictive decision.³

In 1876 the Parliament of Canada enacted legislation based substantially on the Conspiracy and Protection of Property Act. When the criminal law was consolidated into the Criminal Code the "peaceful picketing" clause was omitted and in spite of the persistent protests of labour was not restored until 1934 when S. 501 (9) was enacted. The omission of this clause was emphasized by judges, who, in many cases held that all picketing was illegal. The relevant provisions of the Criminal Code concerning picketing are now contained in S. 501 as follows:

"Everyone is guilty of an offence....who wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain,

1. (1896) 1 Ch. 811

2. (1906) 22 T.L.R. 327

3. Finkelman - op. cit. p. 91 n.

- (a) uses violence to such other person, or his wife or children, or injures his property, or
- (b) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property, or
- (c) persistently follows any other person about from place to place, or
- (d) hides any tools, clothes or other property used by such other persons, or deprives him of, or hinders him in, the use thereof, or
- (e) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road, or
- (f) besets or watches the house or other place where such other person works, or carries on business or happens to be,
- (g) attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section."

Of all the Provinces, only British Columbia has enacted legislation specifically related to picketing. Anticipating the British Act of 1906 the B.C. Legislature relieved trade unions from civil suits and injunctions stemming from peaceful picketing.¹

According to Prof. Laskin² there were no criminal prosecutions for picketing before superior courts in Canada between the enactment of S 501(9) in 1934 and 1947 and I can find none since the latter date.

A few of the principles which have emerged in criminal cases, before Canadian courts may be listed briefly:³

1. R.S.B.C. 1936, C.289, s.2 .
2. op. cit. p. 289
3. Crysler pp. 27-32

1. A striker has no more justification for picketing than he obtains by the common-law right of every individual to go about his business in a peaceable way.¹

2. Picketing which constitutes "practical compulsion" by moral force is a violation of S 501 (f) of the Criminal Code even though physical force is not used or threatened. In the only case involving picketing which has come before the Supreme Court² it was decided that continual picketing by day and by night in order to persuade non-striking workers not to work was an illegal "watching and besetting" and that picketing which constituted an unlawful assembly, a nuisance or a trespass is an offence against S. 501 (f).

3. Any hindrance or molestation of non-striking workers is unlawful.³

4. Picketing otherwise a criminal offense is not justified by the existence of a contract. In R.V. Blackawl⁴ it was decided that watching or besetting a theatre in order to compel the management to hire union musicians was not justified by the fact that there was a contract between the management and the musicians' union.

5. The excuses which S. 501 (g) might afford to picketing at a place of business are not available in the case of picketing at a residence.⁵

6. Picketing is restrainable by injunction and where property rights are affected an injunction will lie notwithstanding that the acts are also criminal.⁶

1. Rex V. Russell (1920) W.W.R. 624

2. R.V. Reners (1926) W.W.R. 810

3. R.V. Doherty and Stewart (1946) 4 D.L.R. 686

4. (1925) 3 W.W.R. 344

5. R.V. Elford (1947), 87 C.C.C. 372 (Ont.)

6. Hurtig V. Reiss (1937) 3 W.W.R. at 558

It is almost impossible to lay down any general principle governing the limits to which picketers may lawfully go in persuading the public not to patronize a particular business.

The civil law relating to picketing is even more complex than that affecting criminal prosecutions. Prof. Laskin puts it thus.¹

"The civil cases on picketing which have come before the courts in Canada in the past quarter century are a veritable wonderland of confusion so far as any consistent theory of liability is concerned. Thus liability has been based upon (1) civil conspiracy to injure (2) The commission of individual acts of wrong doing (3) placards carrying defamatory statements or statements of opinion rather than of fact (4) coercion, threats or intimidation (5) compulsion of patrons of the employer (6) violation of section 501 of the Criminal Code. Some cases have stated that "peaceful picketing" is lawful without defining the term; at least one judge has taken the view that "peaceful picketing" is a contradiction in terms. For some courts patrolling is an acceptable element of picketing, for others patrolling of an organized and consistent character is unlawful as constituting intimidation or coercion. No Canadian case contains any clear-cut announcement that persuasion of members of the public is permissible on the picket line; but there are cases which say categorically it is not."

A yet more significant point of confusion is whether picketing is lawful in the absence of a strike, although there must be a labour dispute in existence. In a 1939² case it was held that because no labour dispute existed between an employer and a trade union that had no previous relationship with him picketing by workers was unlawful and was enjoined

1. op. cit. p. 294

2. Besler V. Matthews (1939) 1 D.L.R. 499

by injunction. However in Canadian Dairies Ltd., J. Seggie¹ it was decided that picketing was lawful in the absence of a strike. Rather obviously the implication of the former case is that unions are deprived of a valuable economic weapon in not being able to picket lawfully an establishment to compel unionism.

The Seggie case is also significant for the valiant attempt of MacKay J. to confine civil liability for picketing to three situations,

- (a) if it is featured by defamatory statements,
- (b) if it is carried on in such manner as to disclose a purpose other than peacefully obtaining or giving information,
- (c) if it is a part of conspiracy to injure.

Although these limitations are helpful, it is true, as Prof. Laskin points out,² that it is far from a complete and satisfactory definition of the lawful limits of picketing. There are other torts besides defamation which may make picketing unlawful. The limits of peaceful persuasion, especially persuasion of the general public, are still unsatisfactorily defined.

The general situation is unsatisfactory for several reasons:

- (a) It makes arbitrariness on the part of judiciary inevitable.

If an employer believes that his workers are engaged in illegal picketing in the course of a strike his normal course of action is to apply to a judge for an injunction. Whether an injunction is granted or withheld will inevitably depend on the personal predilections of the judge as to what constitutes peaceful picketing.³ This brings us dangerously close

1. (1940) 4 D.L.R. 725

2. op. cit p. 295

3. From a conversation with Mr. J. Cohen, B.A. L.L.B. of Calgary on this matter I should judge that many injunctions are framed in very sweeping terms which makes the continuance of effective picketing impossible.

to the totalitarian concept of a government of men rather than of laws.

- (b) The present restrictive interpretations of the limits of peaceful picketing made by the judiciary deprive unions of a legitimate and necessary method of publicizing facts and opinions in labour disputes. The decisions since 1937 of the United States Supreme Court which have declared that peaceful picketing is a form of free speech as guaranteed by the Fourteenth Amendment to the Constitution are inspiring attempts to apply the traditional concepts of civil rights to contemporary economic problems.¹ It should be obvious that in Canadian society the means whereby labour organizations can present facts and opinions during a labour dispute are extremely limited and that the means of mass communication are to an overwhelming degree in the hands of those who are hostile to the trade union movement. In the interests of justice and of the freest possible dissemination of information on public questions our society should "lean over backwards" in permitting labour the widest possible latitude consistent with public order in bringing its case before the citizenry. The courts have, on the other hand, held picketing in some cases unlawful because the pickets carried signs declaring that an employer was "unfair to organized labour".² It is hard to believe that the same words in any other context would provide a basis of successful actions for libel or defamation.
- (c) The situation is intolerably confused in regard to the legality or otherwise of picketing in illegal strikes or in aid of sympath-

1. The American Constitution - A.H. Kelly and W.A. Harbison - New York, 1948 pp. 793-796
 2. Finkleman - pp. 101-101

etic strikes or boycotts. In Toronto very recently a judge refused to grant an injunction against picketing in an allegedly illegal strike because the Provincial Labour Relations Board was the proper authority to declare the lawful nature or otherwise of a strike.¹

This situation could no doubt occur in other Provinces than Ontario.

There is a desperate need for statutory clarification of the limits of lawful picketing. Satisfactory legislation would include the following:

- (a) A recognition that picketing apart from the use of violence, intimidation and defamation is a necessary weapon of organized labour in legal strikes.
- (b) Further statutory clarification of just what actions of picketers constitute unlawful watching and besetting, intimidation, coercion and nuisance, especially so far as these affect the picketers in their relation to the general public,
- (c) The application of the laws of libel, slander and defamation to the publicity methods used by picketers on the same basis that these laws are applied to the expression of facts and opinions in other contexts;
- (d) The statutory recognition of the lawfulness of peaceful picketing as defined by legislation in aid of sympathetic strikes and boycotts;
- (e) Provisions giving authority to the judiciary to issue injunctions against picketing in strikes in which the judge by careful application of the relevant statutes to the particular situation finds that such strike is illegal,
- (f) A clarification of the law of agency relating to picketing so that no national or local union could be made liable for the unauthorized acts of its members on the picket line.

Chapter IIICollective Bargaining Legislation in CanadaA. Canadian Labour Law Relating to the Conciliation and Arbitration of Industrial Disputes before 1937.

The enactment in 1937 of the Trade Union Act¹ and the Industrial Conciliation and Arbitration Act² by the Nova Scotia and British Columbia Legislatures respectively making it compulsory for employers to bargain collectively with unions representing a majority of their employees and providing penalties for failing to do so, marked the end of one era and the beginning of another in Canadian labour legislation. Up until that time both Dominion and Provincial enactments pertaining to trade disputes had been based upon voluntary conciliation or in some cases compulsory conciliation and investigation with a specified period during which strikes and lockouts were illegal.

Pre-1937 legislation rested on three implicit assumptions:

1. A commendable faith in the efficacy of government conciliators to obviate the differences between employers and workers.
2. A belief that the provision of a "cooling off" period during which strikes and lockouts were illegal might forestall precipitate action on the part of either party.
3. A hope that the publication of the reports of conciliation and arbitration boards would bring public opinion behind reasonable settlements of industrial disputes and discourage irresponsible action by parties to them.

The basis of Canadian labour legislation since 1937 rests on the theory that the way to industrial peace lies in compulsory collective bargaining with governments attempting by legislation to equalize the bargaining power of labour and management in particular businesses and industries. The earlier principles of compulsory investigation and arbitration have been combined with mandatory bargaining between employees and government-certified agents

1. Statutes of Nova Scotia, 1937-C 6

2. Statutes of B.C. 1937 - C 31

of employees. In brief, we have in Canada swung from the British to the American tradition in industrial relations legislation.¹

The earliest statutory provisions for the settlement of industrial disputes were made by Ontario in 1873. The Act in question provided for local boards of conciliation to be set up between employers and employees. Significantly, the Act restricted the scope of the boards to disputes not involving any question of wages. Except for an 1888 enactment of Nova Scotia providing for compulsory arbitration, the earlier acts had few compulsory features and most had become dead-letters long before they were repealed.²

The Trades Disputes Act enacted by the Legislative Assembly of Quebec in 1901 was typical of the early voluntary conciliation and arbitration acts. The Act dealt with disputes involving not less than ten workers in the same business. It was provided that the appointed Registrar of Conciliation and Arbitration could on his own initiative (or at the request of an employer or at least five employees to a dispute or at the request of the mayor of the municipality in which the dispute took place) attempt to mediate differences relating to wages, hours of work, conditions of sanitation and ventilation at the place of work or the dismissal of employees for their connection with labour organizations. If mediation failed the dispute might be submitted to conciliation, and if this procedure failed to bring about an agreement, either or both parties might request that an arbitration board be appointed.

1. British collective bargaining legislation since 1871 has been essentially "voluntaristic" in nature as such bargaining between labour and management has long been accepted as a normal feature of British life. The National Labour Relations Act of 1935 (the Wagner Act) in the U.S. made collective bargaining mandatory and redressed the balance in favour of labour. The avowed object of the Taft-Hartley Act of 1947 was to again equalize bargaining power by curbing certain labour practises.

2. Conciliation Law and Practice in Canada - Ronald Hooper - Labour Gazette September 1950 p. 1495

3. Statutes of Quebec 1901 - C 31

The board of arbitration was to consist of three British subjects appointed by the Minister concerned, one on the recommendation of each party to the dispute and the third on the recommendation of the other two. The boards thus set up were to hold public sittings and were to submit their report within one year of their appointment. It was further provided that upon the request of either party to a dispute and upon the approval of the board itself the report of an arbitration board could be made public through the Quebec Official Gazette.

The Dominion entered the field of conciliation when in 1900 the Conciliation Act was passed.¹ This Act provided for the establishment of the Department of Labour and had as its objects the conciliation of labour disputes through the voluntary action of the parties themselves.

A protracted dispute on the Canadian Pacific Railway in 1902 led to the introduction in Parliament of a bill known as the Railway Arbitration Bill a compulsory arbitration measure applied to disputes between railway companies and their employees. Because of widespread opposition to the principle of compulsory arbitration the bill was never enacted and in 1903 the Minister of Labour introduced a more moderate bill which came into the statute books as the Railway Labour Disputes Act.² The Act provided that where any dispute between any railway company and its employees made a strike or lockout likely the Minister of Labour could on his own initiative or at the request of any party to the dispute or any municipal corporation directly affected appoint a conciliation committee of three members, one to be appointed on the recommendation of each party and the third on the recommendation of the other two. If the conciliation committee failed to bring about a settlement, the Minister might at his own discretion refer the dispute to an arbitration board which might, upon the agreement of both parties, have the same members as had the

1. op. cit. pp.1497-1498

2. Statutes of Canada, 1903, C.55.

conciliation committee.

The Conciliation Act of 1900 and the Railway Labour Disputes Act of 1903 were in 1906 consolidated in the Conciliation and Labour Act¹ which is still in effect. The Act provides that where a labour dispute exists in any but the railway industry the Minister of Labour may on the application of the workers or employers appoint a conciliator and on the application of both parties appoint an arbitrator or arbitrators. In the case of a railway dispute which threatens to disrupt services the Minister on his own initiative or at the request of any municipal corporation affected by the difference may appoint a committee of conciliation, mediation and arbitration. Such committee is to be composed of one employer representative, one workers' representative and a third person appointed by the other two or by the Minister in case they cannot agree. If the committee fails to bring about an amicable settlement the Minister may on his own initiative refer the difference to arbitration. For the information of the public and of Parliament it is provided that the report of the arbitration committee must be published in the Labour Gazette without delay. In the case of Government Railways the Minister may confer his authority to appoint conciliators or arbitrators upon the Lieutenant-Governors-in Council of the Provinces of Quebec, Nova Scotia, New Brunswick or Prince Edward Island.²

A prolonged strike of Alberta coal miners in 1906 brought to the attention of Canadians the fact that the public interest required some more positive approach by government to disputes in industries vital to the general welfare. Under the guidance of Mr. W.L. Mackenzie King, then Deputy Minister of Labour in the Federal Government, the Industrial Disputes Investigation Act was in 1907 enacted by the Parliament of Canada. The Act as amended

1. Revised Statutes of Canada 1927 C.110
2. I have not been able to discover why only these Provinces are named in the act.

from time to time was in effect until the proclamation of P.C. 1003 in 1944 and its basic features have been retained in the Industrial Relations and Disputes Investigation Act of 1948. The principles of compulsory investigation and of the reliance on public opinion as a final court of appeal which had formed the basis of the Railway Labour Disputes Act were reinforced by the further coercive provision prohibiting strikes and lockouts till after investigation. Furthermore the 1907 Act recognized a distinction between industries in which a work stoppage would immediately involve the public interest and those not of such vital concern by bringing under the compulsory provisions only public utility and mining industries. The public interest was further protected by a 1918 amendment which empowered the Minister of Labour to appoint a conciliation board at the request of any municipality interested in a dispute in the covered industries or upon his own initiative, a further recognition of Mr. King's frequently quoted statement that "in any civilized community private rights should cease when they become public wrongs."

The I.D.I. Act of 1907 provided for boards of conciliation appointed by the Minister of Labour, one member on the recommendation of each party to the dispute and the third by agreement between the other two or failing agreement, by the Minister. It was provided that if the disputants failed to settle the differences underlying the dispute the board was empowered to make recommendations for the settling of such dispute and majority and minority reports were to be made public. Not until the report has been delivered to the parties affected were they free to alter the conditions of employment with respect to wages or hours regarding which there was a dispute and thirty days notice was to be given by the party desiring the change. The Act provided also that if the parties agreed in writing to be bound by the award it might be made a rule of court of record and enforceable at law.

It was declared illegal for an employer in the covered industries to lock-out his employees or for workmen to strike prior to or during a reference to a board of conciliation and investigation. The Act provided heavy penalties for contravention, an employer was liable for a fine of from five hundred to one thousand dollars for each day that an illegal lockout existed and an employee illegally on strike was liable to a fine from ten to fifty dollars for each day or part of a day he was on strike.

Provision was also made in the Act for its voluntary application to disputes otherwise without its scope. In the latter years of the Act's operation many disputes of this nature were submitted to conciliation with the consent of both parties.¹

The constitutional validity of the I.D.I. Act was denied by the Judicial Committee of the Privy Council in 1925,² and in the same year Parliament re-enacted the legislation to bring it into harmony with the decision in the Snider case.³ The new Act was held to apply not only to disputes in industries within the exclusive legislative jurisdiction of the Dominion but also those within Provincial competence which by the legislation of Provincial Legislature were made subject to the provisions of the Act. Between 1925 and 1932 all the Provinces except Prince Edward Island enacted laws to bring the I.D.I. Act into force within their respective jurisdictions.⁴

The Industrial Disputes Investigation Act was perhaps one of the most effective enactments making for industrial peace which has ever existed in any country. Its basic provisions survived for thirty-seven years, including their extension in two World Wars, and are now extant in the 1948 Industrial Relations and Disputes Investigation Act and in Provincial collective

1. Government Intervention in Labour Disputes in Canada p. 298
in Judicial Proceedings respecting the Constitutional Validity of
I.D.I. Act in Canada - Dept. of Labour 1925
2. *infra* pp. 27-29
3. Statutes of Canada, 1925 - c 14
4. Fifty Years of Labour Legislation in Canada - Edith Lorentsen
and Evelyn Woolner - Labour Gazette Sept. 1950, p. 1429

bargaining statutes. The suspicious attitude to the Act adopted by labour in the years immediately after 1907 gave way after 1917 to a persistent demand by the Trades and Labour Congress that the provisions be extended to other classes of employees.¹ In the first thirty years of the Act's operation there were some 866 applications for boards of conciliation (in 163 cases such disputes were not clearly within the direct scope of the Act i.e. voluntary conciliation on the agreement of both parties occurred) and in all but 39, or 4.5% of the cases strikes were averted.² The compulsory investigation and conciliation of industrial disputes coupled with a prohibition against work stoppages during the period when conciliation proceedings were going on has been Canada's distinctive contribution to industrial disputes legislation and in particular the "cooling-off" period has found its way into the labour enactments of many American States.³

In 1919 the Legislature of Manitoba enacted the Industrial Conciliation Act. Until that time no legislative action had been taken in the Province to deal with labour disputes although the Bureau of Labour apparently had been called upon many times to provide conciliation and mediation services.⁴ The Act provided for a Joint Council of Industry composed of five persons to hold office during the pleasure of the Lieutenant-Governor in Council. Employers' and employees organizations were given the right to nominate two members each and the fifth member was to be an "impartial" person. In addition to its power to investigate matters of wages, cost of living, unemployment, housing and other matters of industrial concern, the council was given the power to act as a board of arbitration at the request of parties concerned to a dispute. There was no compulsory reference of disputes to the council and no enforcement of awards by law.

1. Government Intervention in Labour Disputes in Canada - Dept. of Labour 1925 - p. 299
2. Department of Labour - Annual Report 1937, p.45
3. State Experiments in Labor Relations Legislation - Dale Yoder Annals of the American Academy of Political and Social Science Nov. 1946 - pp. 133-134
4. Government Intervention in Labour Disputes in Canada - p. 294

The Act was in force for only two years and at the 1922 session of the Legislature was so reduced as to make the provisions inoperative.

In the Province of Quebec the interest of the public in industrial peace was recognized earlier and more clearly than in the other Provinces. In part perhaps this is a reflection of the social teachings of the Catholic Church which have stressed social solidarity and have always rejected the laissez-faire concepts of free contract as being a field in which state interference was unjustifiable. In 1921 the Quebec Legislative Assembly enacted the Municipal Strike and Lockout Act¹ dealing with disputes between any municipal authority and policemen, firemen, waterworks employees or garbage workers if at least twenty-five persons were employed in any one of these classes. The statute provided for compulsory references to arbitration in disputes involving wages, hours of labour or discrimination against union members and prohibited under penalties strikes or lockouts before the dispute was thus submitted. There were no provisions for enforcement of the arbitration award.² In 1924 the Professional Syndicates Act was enacted and is still in effect. The Act provided for the voluntary formation of twenty or more employees in the same trade, profession or business into a syndicate which in effect could become certified bargaining agencies for their members by registration with the Provincial Secretary. Any collective labour agreement entered into by a syndicate was to be enforceable at law and the syndicate might hold property and sue or be sued as a judicial person. The Quebec Labour Agreements Extension Act of 1934⁴

1. Statutes of Quebec 1921, C.46, amended 1922, C.40

2. As will be seen these provisions followed closely that of the I.D.I. Act. In general it appears that municipal corporations were unwilling to cooperate in submitting disputes with their employees to the Federal conciliation service. Government Intervention in Labour Disputes in Canada pp. 298-299

3. Revised Statutes of Quebec 1941, C.162

4. Revised Statutes of Quebec 1941, C.163

provides for the application of the wages, hours and apprenticeship terms of a collective agreement to non-parties in the same industry, trade or occupation in any region or in the Province as a whole by order of the Lieutenant-Governor in Council. The collective agreements thus made obligatory are enforced by joint "parity committees" of employers and employees which may make a compulsory levy for administrative expenses on both parties and which may sue for unpaid wages. A number of agreements made in particular businesses have been extended to the whole Province in the construction, boot and shoe, fur, clothing, printing, garage and service station industries.¹ In 1948 some 204, 428 workers were employed under agreements extended by the Act.² This represented 16.8 per cent of all workers covered by collective agreements in Canada in 1948 and 12.2 per cent of the Quebec working force.³ Aside from sections of the Alberta Labour Act⁴ enacted in 1947 no other Canadian government has in peace time enacted legislation of this type although it is a normal practice in some industries in the United Kingdom and in New Zealand, South Africa and Australia.⁵

1. Number of Workers Affected by Collective Agreements in Canada by Industry, 1948. Dept. of Labour Publication, 1950 p.4
2. op. cit. p.5
3. 1948 Canada Year Book p.
4. Sections 46 to 56 of this Act (Statutes of Alberta, 1947, C 8) provide that upon petition of employers or workers in a particular industry in a zone defined by the Minister the Minister may call a conference of all workers and employers in the industry within the zone to formulate certain industrial standards and, if this is agreed upon by a majority of employers and employees in the industry in the zone, it may be made binding on all by Ministerial Order.
5. Crysler p. 45

In Alberta the Alberta Labour Disputes Act was enacted in 1926 to provide for machinery for settling industrial disputes. The Alberta legislation was modelled upon the Industrial Disputes Investigation Act, whose validity had been denied by the Snider decision,¹ except that it did not prohibit strikes and lockouts and was made applicable to all industries. In 1928, when the Alberta Legislature made the I.D.I. Act applicable to such disputes as were within the scope of the Act, the Labour Disputes Act was amended to make it not applicable to disputes not within the Dominion legislation, that is, to disputes in industries other than mines and public utilities as defined in the I.D.I. Act. The 1926 statute was repealed and replaced by the Conciliation and Arbitration Act of 1938.

Apart from the enactments of Manitoba, Quebec and Alberta which have been discussed there was almost no legislation referring to industrial disputes brought into existence in Canada between 1907 and 1937. Apart from Quebec, the voluntary conciliation acts of the Provinces fell into desuetude and in some cases were repealed. After the validity of the I.D.I. Act of 1907 was challenged in 1925 and a new Act enacted all the Provinces but P.E.I. brought into existence legislation which extended the provisions of the Federal law to disputes within exclusive Provincial jurisdiction.

1. infra p.27-29

Industrial Disputes Legislation in Canada 1937-1945

In spite of the remarkable success of the I.D.I. Act machinery in the promotion of industrial peace, Canada's industrial disputes legislation as it existed in 1937 was by no means adequate to the demands of a modern industrial economy. Only 384,619 workers were organized in trade unions,¹ most of them craft unions of skilled workers. Few of the unskilled and semi-skilled employees in manufacturing and primary industries were as yet organized. The open shop principle was supported by many employers and the demotion or dismissal of workers for union activity was not unusual. Existing legislation and judicial decisions had made it evident that trade union activity which would be effective might subject participants to both civil and criminal penalties.²

During World War I the Federal Government issued an Order-in-Council forbidding an employer to dismiss an employee because of union activity but this progressive measure elapsed automatically at the end of the emergency period and it took labour nearly two decades to win back the position it had held in 1918.³ In the mid-1930's the drive for compulsory bargaining and against discriminatory treatment from the courts and from employers began in earnest. The Trades and Labour Congress, no doubt stimulated by the growth of unions in number and strength under the National Labour Relations Act of 1935 in the United States, agitated for the amendment of the Criminal Code to make discrimination against union members unlawful and circulated a model draft bill among members of Provincial Legislatures.⁴ The central points of the draft bill were to render it lawful for workers to organize

1. 1937 Canada Year Book

2. Recent Labour Legislation in Canada - Bora Laskin C.B.R. Vol. XXII (1937) pp 779-780

3. Logan - Trade Unions in Canada pp 414-418

4. Logan - p. 416

themselves into trade unions for collective bargaining and to make it lawful for employees to bargain through officials or representatives of unions. Union security was the chief theme of the T.L.C.'s Annual Convention in 1938¹ and the delegates could show in pressing their arguments home that strikes in 1938, after low depression levels, had resulted in the loss of more working days than in any year since 1925 and that many of these strikes had involved disputes over union security.²

What Prof. Laskin calls "the death of this old policy of negation of worker's freedom to combine"³ came with the passing of the Nova Scotia Trade Union Act in 1937.⁴ The Act declared it to be lawful for workers to join together in trade unions and for the first time in Canadian history employers were compelled by law to bargain with trade unions representing a majority of their employees under pain of a maximum fine of \$100 or 30 days in jail. The writing of clauses restricting union activity in collective agreements and the use of threats or intimidation to prevent workers from making use of the rights guaranteed to them under the Act were forbidden.

In the same year the Legislature of British Columbia enacted the Industrial Conciliation and Arbitration Act⁵ which recognized the legal rights of employees to bargain collectively through a negotiating committee. The Act made it mandatory upon employers to bargain collectively with such committees and provided penalties of up to \$500 for each offense if they so refused. There was no certification procedure provided by any group of workers was to furnish the Minister with certain information when they appointed a bargaining committee. It was also made an unlawful act for an

1. op.cit. p. 416

2. Canadian Strike Trends - J.I. Griffin - Public Affairs July 1948 - P185

3. op.cit. p. 780

4. Statutes of Nova Scotia 1937, C. 6.

5. Statutes of B.C. 1937, C. 31.

employer to use intimidation, demotion, pecuniary loss or the threat thereof to restrain union activity. The Act provided for the appointment of a conciliation commissioner upon the request of either party to a dispute the ^{or} Minister could do so on his own initiative. The Conciliation commissioner was required to report to the Minister with its recommendations and if no agreement has been reached the Minister was required to appoint a board of arbitration, consisting of one representative from workers, one from the employers and a chairman who was acceptable to both. The arbitrators were required to make their award within fourteen days of their appointment. The award was to be accepted or rejected by employers (where more than one was involved) or employees by voting by secret ballot which might be supervised by the Minister. It was further provided that between the time when a conciliation board was appointed and fourteen days after the vote on the arbitration award was made no strike or lockout could be held. Where any dispute arose a strike or lockout could not lawfully take place before a request for the appointment of a conciliation commissioner had been made.

In the same year, 1937, the Manitoba Legislature enacted the Strikes and Lockouts Prevention Act¹ which provided for the appointment of a tripartite conciliation board if either party to an industrial dispute so requested. The Act provided that there should be no strike or lockout or no changes in wages or hours of work prior to the request for the appointment of a conciliation board nor during the period in which the dispute was under review.

The year 1938 saw the Alberta, New Brunswick and Saskatchewan enact legislation providing for compulsory collective bargaining. The Alberta Industrial Conciliation and Arbitration Act² was almost identical with the

1. Statutes of Manitoba 1937 C.40

2. Revised Statutes of Alberta 1942, C.280

British Columbia law of the previous year. The New Brunswick Labour and Industrial Relations Act asserted the right of employers and employees to bargain collectively. Penalties of up to \$100 for each offence were provided for employers who attempted to prevent their employees from engaging in lawful union activity. The Act was somewhat restricted in its application as its provisions extended only to businesses in which more than thirty workers were engaged. The Saskatchewan Freedom of Trade Union Association Act similarly made collective bargaining mandatory upon employers and prohibited restrictive clauses in agreements and the use of force, intimidation or demotion to prevent lawful union activity.

The Federal Parliament's contribution to the problem of union security was the enactment in 1939 of an addition to the Criminal Code which made it an offense for an employer or his agent to

- (a) refuse to employ or to dismiss from employment any person for the sole reason that he was "a member of a lawful trade union or of a lawful association of workmen or employees formed for the purpose of advancing in a lawful manner their interests and organized for their protection in the regulation of wages and conditions of work".
- (b) seek by "intimidation, threat of loss of position or employment, or be causing actual loss of position or employment" to compel workers to join any union they had a right to abstain from joining or to abstain from joining any union to which they had a lawful right to belong,

- (c) "conspire or combine" with any other employer and his agent to do any of the things mentioned in (a) or (b).

The amendment provided penalties for its infringement of a maximum of one hundred dollars fine or three month' imprisonment in the case of an individual or of one thousand dollars in the case of a corporation. Rather obviously, S. 502A provides a source of confusion in not defining under what conditions a labour combination has been formed for advancing in "a lawful manner" the interests of its members. The latitude of the courts in defining what unions come under the provisions of 502A and under what conditions has been greatly restricted by the enactment of more recent Federal and Provincial legislation making certain labour practices unlawful and providing for the certification of bargaining agents by an administrative authority. However, there are still areas regarding picketing, sympathetic strikes and revolutionary activity by unions which make necessary further statutory action by governments before the application of the provisions of this amendment are as clear-cut as could be desired.¹

Canada entered World War II with only a minority of her labour force covered by compulsory collective bargaining provisions. In Nova Scotia, British Columbia, Alberta and Saskatchewan the enactments of 1937-38 had all suffered from the defect that no administrative machinery for enforcing the rights guaranteed to workers by statute had been provided. As we have seen² the general structure of war-time federal labour legislation was the extension of the provisions of the I.D.I. Act of 1925 combined with a system of wage-fixing machinery.

1. infra pp. 70-77

2. infra p. 36

The Collective Bargaining Act enacted by the Legislature of Ontario in 1943 was the first labour legislation in Canada combining mandatory collective bargaining with a system of certification of bargaining representatives. The Act imposed upon the Labour Court, a section of the High Court of Ontario, the duty of certifying trade unions as bargaining agents of workers and employers were required by law to bargain with such agents. The Court was also empowered to order any person to restrain from violation of the Act, to direct compliance with its provisions and to direct reinstatement of any employee with monetary compensation who had been discharged contrary to provisions of the Act. There was to be no appeal from the actions or decisions of the Court. The statute contained the usual prohibitions against clauses restricting union activity in collective agreement and the use of intimidation, threats, monetary penalties and demotion for lawful union actions which had been provisions of the legislation in Alberta, Saskatchewan, New Brunswick, British Columbia and Nova Scotia. The Act was declared not applicable to farm workers, employees of a police force, domestic servants and employees of the Ontario Hydro-Electric Commission and of local governments.

The War time labour legislation enacted by the Federal Government has been discussed in an earlier section.¹ It is remarkable to note that collective bargaining did not become compulsory until 1944 although wages and other working conditions were regulated by several Orders-in-Council.

1. *infra* pp. 35-38.

B. Collective Bargaining Legislation Now in Existence in Canada.

I have outlined how Canadian labour legislation has moved further and further away from "voluntarism" since 1937. Prof. Selig Perlman has traced the policy of the state to labour unions through five successive stages; suppression, grudging toleration, benevolent toleration, promotion, absorption.¹ There would seem to be little doubt that Canadian governmental policies are somewhere between the third and fourth stages. Perlman's analysis appears weak in that the absorption of labour unions by the state would seem to depend upon one of two conditions - the absorption of labour unions as but one arm of a totalitarian state as in Italy or Russia or the dependence of a democratic government on trade union support as in Britain. The sequel to the Wagner Act in the United States was the Taft-Hartley legislation which endeavoured to curb the power of labour organization in the general welfare. Be that as it may, the experience of other nations seems to suggest that Canadian governments may be expected to intervene to an ever-increasing extent in relations between workers and their employers. The final section of this thesis will analyze and compare collective bargaining legislation now in existence with the Federal Industrial Disputes and Investigation Act of 1948 being used as a standard of comparison.²

1. The principle of Collective Bargaining - Annals of the American Academy of Political and Social Science : Vol. 184 pp. 156-157
2. The Department of Labour in 1949 reprinted the labour legislation of the Federal Government and of the Provinces as it existed at the end of 1948. Within the past three years amendments to this legislation have been made at each Session of Parliament and of the Legislative Assemblies but only Ontario has made a substantial revision. In order to save space this part of the thesis will not note each enactment. The text of Newfoundland legislation was not available to me.

1. The Scope of Existing Collective Bargaining Legislation

Although the right of workers to bargain collectively with their employer is asserted by the Federal Act and by the Acts of all the Provinces, certain groups for one reason and another are exempted from the collective bargaining legislation enacted by Parliament and all the Provincial Legislatures.¹

(a) Civil Servants.

The Federal Act specifically exempts Dominion civil servants from its provisions. However, employees of Crown companies come within the provisions of the Act except those who are specifically excluded by Order in Council. In 1950 employees of the Canadian Arsenal Ltd. and the National Research Council had been so excluded.

In 1944 the Quebec Legislature enacted the Public Services Employees Disputes Act.² which provides for compulsory arbitration in disputes involving employees of the Provincial and of local governments. Strikes and lockouts are prohibited in all circumstances. It is also provided that policemen in particular and other civil servants generally shall not belong to an employees' association not consisting solely of employees in their own category or having affiliation with any other association.

The provisions of the Ontario Trade Union Act of 1950 do not apply to policemen, firemen or teachers. In the case of the first two groups legislation similar in effect to that in Quebec exists.³

1. In 1950 the Federal Department of Labour estimated that 309,500 workers were covered by the Industrial Disputes and Investigation Act. Of these approx. 77 per cent were engaged in transportation industry under Federal control and approx. 14 per cent in telephone, telegraph and cable and radio broadcasting industries. The rest were employees of Federal Crown Corporations, workers in Yukon and the N.W. Territories, employees on works declared for the "general advantage of Canada" by Parliament and workers in other inter-provincial industries - The Industrial Relations and Disputes Investigation Act - Dept. of Labour Publication p.2

2. Statutes of Quebec, 1944 C.31.

3. Statutes of Ontario 1947 C.37 and C.72.

The Legislature of Saskatchewan in 1947 enacted an amendment to the City Act which provided that employees of city police forces could enter into collective agreements with the Board of Police Commissioners in cities of more than 15,000 population or the City Council in cities of less than 15,000 population, as employers and that the provisions of the Trade Union Act would apply to these relations. In each case the chief of police would be considered the agent of the employer.¹

Except perhaps in the case of police and supervisory government employees, there are overwhelming arguments that collective bargaining between civil servants and governments should proceed under the ordinary collective bargaining legislation of the Federal Parliament and the Provinces. I shall examine the question of compulsory arbitration in a later section.² but it appears necessary to realize that there is no compelling reason to prohibit strikes of civil servants unless similar prohibitions are enforced against workers in vital private industries. In a sense, any work stoppage is "against" the community and the effects of strikes of firemen, or government clerks or collectors of income tax can scarcely be thought to be more potentially damaging in effect than similar work stoppages involving meat-packers, locomotive engineers or milkmen. The prohibitions against the affiliation of civil servants with unions including other workers is, I believe, unwarranted discrimination. It is particularly unfortunate that the Federal Act is not extended to Dominion employees.

(b) Supervisory Employees

It is a sound principle that employees whose work is of a supervisory nature or who are commonly taken into the confidence of management should not organize themselves into trade unions composing other personnel and any departure from this principle will undoubtedly make the position of management intolerable. The Federal Act declares as follows:

1. Statutes of Sask. 1947, C.43 SS.92 (2) and S.100

2. infra pp. 142 - 151

"S. 2 (1) (i) 'Employee' means a person employed to do skilled or unskilled manual, clerical or technical work but does not include

(1) a manager or superintendent. or any other person who, in the opinion of the Board, exercises management functions or is employed in a confidential capacity in matters relating to labour relations."

The collective bargaining Acts of all the Provinces except Prince Edward Island contain similar provisions.

I believe that provisions should be made whereby those who work in a supervisory or confidential capacity can bargain collectively. It is completely unrealistic to assume that an identity of interests with management exists so far as the managerial group is concerned. In many cases these employees have a clearly defined interest with others who work in a similar capacity and this interest could well be promoted through the normal collective bargaining legislation of the Federal Parliament and the Provinces. The only safeguards necessary could be provided in requiring that supervisory and confidential employers do not join or affiliate themselves in any way with unions composing other workers.

(c) Other Employees Who are Not Covered by the Normal Collective Bargaining Legislation.

The collective bargaining laws of the Federal Parliament and the Provinces exempt certain other groups of workers from their provisions. These exemptions may be tabulated briefly:

- (1) The Federal legislation and that of Manitoba exempt members of the medical, legal, dental, architectural, and engineering professions.

- (2) The Alberta and British Columbia Acts exempt employees engaged in Agriculture and domestic service. The British Columbia law carries further exemptions of apprentices and those employed in fishing and hunting.
- (3) An amendment to the Prince Edward Island Trade Union Act in 1948 provides in effect that no union may operate in that Province if it has membership in or affiliation with any unions outside the Province.¹
- (4) The Ontario Act provides that guards are not allowed to join trade unions that include other employees.

1. Dr. Eugene Forsey believes the Act to be ultra vires as an infringement of the Federal power over criminal law and immigration and as an attempt to regulate property and civil rights outside the Province. He makes a somewhat better case that the Act should have been disallowed by the Federal authorities as being contrary to public policy - The Prince Edward Island Trade Union Act. - C.B.R., Oct. 1948, pp. 1159-1181.

2. Unfair Labour Practices

The parties whose interests are directly involved in industrial relations are labour, management and the public. Insofar as the legitimate interest of any one of these groups is menaced by the activities of trade unions or business firms it becomes necessary to prohibit by law certain labour practices. In general, Canadian labour legislation does not recognize that workers as individuals have rights vis-a-vis labour organizations, which rights need protection by special enactments not applying to the relations between other individuals and groups, nor is the relationship between one union and another an object of special legislation.¹ It is implicit in Canadian labour law that the interests of unions and of individual workers are in harmony and that organized labour itself can be trusted to eliminate without state interference the practices which are deleterious to the welfare of union members.

1. Discrimination

The Federal Industrial Disputes and Investigation Act makes it an unfair labour practice to refuse to employ or to discriminate against a worker solely because he is a member of a trade union or to by threats or by actual loss of position or money to discourage a worker from joining a union or participating in its activities. All the Provinces have identical or similar enactments. Obviously this legislation has grown out of S. 502 A of the Criminal Code.²

1. The Taft-Hartley Act recognizes a divergence of interest between workers and unions and purports to guarantee the freedom of workers covered by its provisions to choose their bargaining agents, to participate in truly representative elections and to enter any occupation or industry (cf. prohibition of closed shop.) For a sympathetic account of the act see reprinted article of Summer H. Slichter from the American Economic Review of Feb. 1949
2. *infra* pp. 17, 18.

Saskatchewan is the only Province in which a Bill of Rights in the American sense of the word exists. Sections 8,9 and 12 of the Bill of Rights Act of 1947 declares that every person has a right to employment and to trade union membership without discrimination as to race, creed or national origin.¹ The Ontario Labour Relations Act of 1950² declares that any arrangement between workers and employers which provides for discrimination against any person because of his race or creed shall not be considered a valid agreement. The Regulations issued by the Unemployment Insurance Commission to each National Employment Service office specifically forbid officers to discriminate against any applicant seeking work because of his "racial origins, religious belief or political affiliation."³ Although the problems, constitutional and otherwise, which would arise from the enactment of Bills of Rights and Fair Employment Practices Codes in Canada would take us too far afield, it may be pointed out that it is surely an incongruous situation, when, under Federal legislation and that of most of the Provinces, discrimination against a worker is an offense only if its sole grounds are trade union membership or activity.

2. Company Unions

In the past many employers in Canada and elsewhere have sought to forestall the growth of labour organizations representing

1. Statutes of Sask., 1947 C. 35. This legislation differs significantly from National and State Bills of Rights in the United States in that it was enacted through the ordinary law-making processes and can be similarly amended, altered or repealed.
2. Statutes of Ontario 1950, C.34
3. Policy of Unemployment Insurance Commission against Employment Discrimination - Labour Gazette - Oct. 1950 p. 1637.

the genuine interests of their workers by encouraging unions to a greater or lesser extent dominated by management. The Industrial Relations and Disputes Investigation Act and the collective bargaining legislation of all the Provinces contain prohibitions against employer support of or participation in trade unions, although in each case except that of Quebec it is provided that the employer may lawfully confer with a representative of a union upon union business during working hours without deducting pay for time so spent from the representative's wages. The Federal enactment and those of Ontario, Saskatchewan, Nova Scotia and British Columbia forbid the respective administrative boards to certify a company - dominated union as a bargaining agency. Interestingly, New Brunswick and Ontario legislation forbids unions to support or participate in employer associations.

The enactments of prohibitions against employer support of trade unions have been made and enforced for such obvious reasons that no comment is necessary. It is suggested that other Provinces "put teeth" into their legislation by following the device used by the Federal Parliament and the Legislatures of Ontario, Saskatchewan, Nova Scotia and British Columbia in prohibiting labour boards from certifying company unions.

3. Trade Union Activities on the Employers' Premises

There are clauses in the Industrial Relations and Disputes Investigation Act and in the enactments of Nova Scotia, New Brunswick, Quebec, Manitoba, Alberta and British Columbia which prohibit, except with the consent of the employer concerned, the solicitation of workers on behalf of trade unions upon the employer's premises. In Nova Scotia this prohibition applies at all times but in other Provinces and in businesses and industries operating under the Federal legislation the restriction applies only during working

hours. A Quebec enactment forbids also the convening of meetings of employees with the object of soliciting trade union membership on the employer's premises without his consent at all times.

4. The Closed and Union Shop

The problems arising from the closed and union shop have led to more bitter disputes than have any other problems in labour relations. Only in Prince Edward Island is there a specific prohibition against closed shop contracts. The Federal Act and enactments of Alberta, Saskatchewan, Ontario, Manitoba and British Columbia specifically state that the making of closed or union shop agreements giving members of specified unions preference in employment is not prohibited by the respective collective bargaining legislation. The "closed shop" agreement i.e. the type of agreement by which a worker must belong to a specified trade union before he can obtain employment in the firms so covered by "closed shop" provisions, is a device which lends itself to abuse. The creation of artificial scarcities in various crafts (and perhaps, it can be whispered, some of the most respectable professions) by arbitrary and discriminatory entrance requirements is rather clearly an anti-social practice for which there is little justification. The real argument against enactments prohibiting closed shop arrangements lies in the difficulty of enforcement and it appears that the section of the Taft-Hartley Act which contains such a prohibition has been rather widely evaded.¹

The union shop agreement puts no restrictions on the employer's power to hire whom he will but specifies that a worker must join the union within a certain time after he has been hired or he will

1. Labour and Industrial Relations - R.A. Lester - New York, 1950
p. 154

be discharged. It would seem unwise and unjust to put any legal obstacles in the way of union shop collective agreements. Labour peace is just not possible in many industries if unions do not bargain for all the workers or if there are "free riders" working with union members. Labour discipline, so important to industrial peace, is not probable in industries where the union does not include all employees.

The Saskatchewan Act attempts to encourage the formation of union shop contracts by providing that at any time a union representing the majority of employees in any bargaining unit can insist on a clause providing for union shop and maintenance of membership provisions being written into the governing collective agreement. The employer is required by law to abide by such terms so long as the union is the appropriate bargaining agency and failure to do so constitutes an unfair labour practice.

The Saskatchewan legislation shows an intelligent realization of the social desirability of union shop contracts. Similar clauses in the collective bargaining enactments of other Provinces and of the Federal Parliament would contribute to the cause of industrial peace in Canada. If such enactments were coupled with provisions making failure to bargain collectively an unfair labour practise there can be little doubt that unions would feel a sense of security that would eliminate much of the bitterness surrounding present labour relations.¹

1. The so-called "Rand formula" developed by Mr. Justice Rand in the Ford Motor Company Arbitration Award of 1946 provides an alternative solution to the problem of union security. This award provided that employees should be required to pay regular union dues but not to join the trade union. Also "maintenance of membership" provisions may be somewhat more acceptable in many quarters than the direct approach of the Saskatchewan provisions.

5. Labour Practices Which Restrict Production

In Nova Scotia, New Brunswick, Quebec, and British Columbia there exists legislation prohibiting labour practices which unduly restrict production. However, the enactments of New Brunswick and British Columbia qualify these prohibitions by stating somewhat ambiguously that no provision in a collective agreement for the "safety or health" of the workers shall be so deemed an unfair labour practice. Obviously the restrictions of all the Provinces are directed at the more blatantly restrictive practices of unions. The solution seems to lie in the elimination of restrictive attitudes of workers and union leaders in the atmosphere of an expanding economy and by the assumption by government of responsibility for the rehabilitation of workers who are the victims of technological unemployment rather than in specific prohibitions. Adequate union shop agreements also do a great deal to protect management and society against unofficial slow-downs and restrictive practices. The prohibitions discussed above are feeble and superficial approaches to the problem.

6. The Prohibition of Strikes and Lockouts During the Conciliation and Arbitration Period

One of the few distinctive contributions that Canada has made in the development of collective bargaining legislation lies in the provision of a "cooling off" period when a labour dispute is under conciliation and arbitration during which period a strike or lockout is illegal.

It is significant to note the relative lengths of the "cooling off" periods in Canadian labour legislation as measured between the time either party requests conciliation procedure and

the time a legal strike or lockout may be held, allowing conciliation and arbitration boards the maximum time permitted by statute to hand down their decisions:

Federal Act: 47 days.

P.E.I. - no provision except that a strike or lockout is illegal during undefined period of arbitration.

N.B. 57 days.

N.S. no specific time given for conciliation officer to make his report but the conciliation board has 14 days to bring in a report and no strike or lockout can lawfully take place till 7 days after this report has been submitted to the Minister.

Quebec no specific period - arbitration boards have 3 months in which to begin their activities.

Ontario no specified period.

Man. 47 days.

Sask. No strike or lockout during the time a dispute is under conciliation can take place lawfully although there is no specified length of "cooling off" period.

Alberta 49 days (period for taking vote of employees on arbitration award disregarded)

B.C. 20 days (period for taking strike vote after Conciliation Board report disregarded.)

The "cooling off" period makes possible the examination of every alternative way to a settlement of a labour dispute without a work stoppage. J.R. Hicks widely-accepted theory of industrial disputes¹ states that most strikes are the result of faulty estimates by the union as to what concessions the employer will make in order to "buy off" a strike before it occurs and of faulty estim-

ates by the employer as to the minimum concessions the union will accept. Hicks says:

"Any means which enables either side to appreciate better the position of the other will make settlement possible. The danger lies in ignorance by one side of the others dispositions, and in hasty breaking-off of negotiations..... "

The "cooling off" period gives each party every opportunity under the guidance of conciliation officers and boards to appreciate the temper and the position of the other.

Labour leaders have often attacked the length of periods during which strikes are illegal. The potential strength of the strike weapon depends to a large degree on the ability of unions to "time" strike action. To different degrees in various industries and businesses a strike or the threat of a strike may be particularly effective when the firm is producing at its peak or when an important contract has been undertaken or when there is an unusual shortage of labour. The provisions of the Canadian enactments make it quite impossible for the union leaders to predict just when a legal strike can be called i.e. conciliation officers and boards may take a longer or shorter time to perform their functions within the limits set by statutes or in Provinces where there is such a provision, the dispute may or may not "go to arbitration." However, I believe that the blunting of this particular weapon of labour is justified by the interest of the organized community in industrial peace.

The Federal legislation and that of every Province provide that no strike or lockout can lawfully take place until the dispute has been submitted to the conciliation, and, in cases where so provided, arbitration machinery as enacted. In the Federal law and in the law of all the Provinces except P.E.I., Alberta and Saskatchewan strikes and lockouts during the duration of a collective agreement

are unlawful.

(7) The Refusal to Bargain Collectively

In Saskatchewan, Alberta, Prince Edward Island and British Columbia the failure of an employer to bargain collectively with a union representing the majority of his employees in an appropriate bargaining unit is an offence and penalties are provided. In British Columbia it is also an offense for a union to fail or refuse to bargain collectively and the law provides that for unions (as for employers) this failure constitutes a separate offense each day it is carried on. There can be little doubt that compulsory collective bargaining with real "teeth" in it is necessary for the cause of industrial peace in Canada.

(8) Penalties Provided for Unfair Labour Practices

- (i) Federal - individuals found guilty of unfair labour practices are liable to fines not exceeding one hundred dollars. For a corporation, a trade union or an employer's association, the maximum fine is one thousand dollars. A corporation is liable upon summary conviction to a fine of two hundred and fifty dollars per day for an illegal lockout and unions for fines of one hundred and fifty dollars a day for illegal strikes. Officials representing management or unions are liable to maximum fines of three hundred dollars for authorizing illegal lockouts or strikes. Furthermore, magistrates are empowered to order the reinstatement of a worker dismissed because of union activities and to order payment of back wages for the period of investigation.
- (ii) Prince Edward Island - a maximum fine of one hundred dollars, or, alternatively, thirty days imprisonment is provided for each offense in which an employer refuses to bargain collect-

ively with a trade union representing a majority of his employees.

(iii) Nova Scotia - maximum fines of two hundred dollars for an individual and five hundred dollars for a corporation, a trade union or an employers' organization found guilty of committing unfair labour practices. Those responsible for illegal strikes or lockouts may be fined a maximum of one hundred and fifty and one hundred dollars respectively for each day that the strike or lock-out exists. Provisions similar to those of the Federal Act govern the reinstatement of workers illegally discharged.

(iv) New Brunswick - penalties of a maximum of one hundred dollars for individuals and five hundred dollars for employers' organizations, trade unions or corporations are provided for offences against the Act. Maximum fines of five hundred and two hundred dollars per day respectively are provided for employers and unions who declare illegal strikes. It is further provided that any employee who strikes illegally is liable to a fine of twenty dollars for each day he is on strike.

(v) Quebec - Minimum and maximum fines of from one hundred to five hundred dollars are provided for employers who fail to negotiate collective labour agreements with unions representing their employees. For subsequent offences penalties of from two hundred to one thousand dollars are provided. An individual representing an employer, employers' association or professional syndicate who is responsible for an illegal strike or lockout is liable to a fine of between one hundred and one thousand dollars per day. In cases where an individual acts without such authority he is similarly liable to a fine of between ten and fifty dollars per day.

(vi) Ontario - Maximum fines of one hundred dollars per day in case of individuals and of one thousand dollars per day in the case of corporations, employers' organizations and trade unions for contravention.

of the provisions of the Act.

(vii) Manitoba same as Federal Act.

(viii) Saskatchewan - there is provision for minimum or maximum fines of twenty-five and two hundred dollars for individuals who are responsible for unfair labour practices. In the case of corporations (but not unions) minimum and maximum penalties are two hundred and five thousand dollars. Subsequent offences makes those responsible liable to the same fines and a maximum of one years' imprisonment. In addition the Act provides that the Lieutenant-Governor in Council can take over any business in which an employer has disregarded or disobeyed any order of the Labour Relations Board and operate such business until the Lieutenant-Governor in Council is satisfied that future orders of the Board will be obeyed.

(ix) Alberta - anyone convicted of intimidation in threatening any person with loss of position employment or of actually causing any person loss of position or employment as a penalty for lawful trade union activity is liable to a fine of not more than five hundred dollars and costs. Any representative of an employer, employers' association or trade union who calls an illegal strike or lockout is liable to a fine of not more than fifty dollars for each day the strike or lockout exists. Upon the certification by a judge that a strike is illegal, the union whose members are on strike is liable to a fine not exceeding one dollar for each worker participating in the strike for each day it exists. If a union defaults in such fine the employer is authorized by a magistrate to deduct such moneys from his employees' wages in accordance with any check-off provisions.

(x) British Columbia - maximum fines of twenty-five and one hundred and twenty-five dollars are provided in the cases of individuals and employers, employers' associations and trade unions respectively who fail to bargain collectively in accord with the provisions of

the Act. A separate offence is created for each day that such refusal or failure continues. Every employer who authorizes an illegal lockout is liable to a fine not exceeding one hundred and twenty-five dollars each day the lockout continues and every representative of an employer who similarly causes an illegal lockout is liable to a maximum fine of fifty dollars per day. Maximum fines for illegal strikes are provided at the rates of one hundred and twenty-five dollars per day and fifty dollars per day for trade unions or their representatives respectively. Maximum penalties of fifty and one hundred and twenty-five dollars are provided in the case of individuals and trade unions respectively who solicit trade union membership on the employer's premises during working hours or who support or engage in any activity to limit production.

(9) Conclusions.

Adequate legislation would prohibit the following labour practices only:

- (i) The solicitation of union membership or the carrying on of trade union activities on the employer's premises during working hours without his consent.
- (ii) The use of violence or intimidation in labour relations.
- (iii) The failure of unions or employers to bargain collectively under the terms of the Acts.
- (iv) Discrimination by unions or employers against workers on the basis of race, creed, national origin or trade union affiliation or activity.
- (v) Lockouts and strikes during the period a dispute is in process of conciliation and in cases where so provided, arbitration.
- (vi) Employer participation in or support of trade unions.

Although there may be compelling arguments against the closed shop and practices restricting production as anti-social actions, I believe that legislation prohibiting these practices would be difficult or impossible to enforce and that more fruitful approaches to these evils lie in other directions.

Certain principles governing the enforcement of unfair labour practices provisions can be stated briefly:

- (i) No prosecution should be made without the consent of the appropriate labour relations board.
- (ii) Penalties for refusing or failing to bargain collectively should be made much more severe than at present.
- (iii) Corporations, employers' associations and trade unions rather than individuals should be made liable for unfair labour practices unless it could be shown quite clearly that individuals were engaging in unfair practices without authority so to do given by their principals.
- (iv) A recognition of the relatively weaker financial position of trade unions than employers should be made by the enforcing of higher penalties against employers who commit unfair labour practices.
- (v) Heavy penalties should be provided for employers who participate in or support trade unions.

In general, I believe that the cause of industrial peace is furthered if unions representing a majority of workers in appropriate units are granted by law a high degree of security. In the past the most bitter industrial disputes have revolved about the issues of union security and if these conditions are allowed to prevail the less moderate elements in both management and labour will no doubt exercise a decisive influence. Union security on the other hand will in most cases lead to mutual confidence as the workers are aware that the employer cannot destroy their

bargaining power by infiltration, discrimination against union members, refusing to bargain collectively or by more violent means. When such security is achieved but not before straightforward bargaining on the matters of wages, hours, working conditions etc. can take place.

3. The Certification and Re-certification of Bargaining Agents.

The Federal Industrial Disputes and Investigation Act and the legislation of every Province except Prince Edward Island provide for the certification of trade unions as the bargaining agents of workers. In effect this is a form of compulsory arbitration by appointed administrative boards of an often-disputed issue in relations between employers and workers i.e. the question of which organization should represent workers in their bargaining with employers. The decision as to whether a particular labour organization should be certified will depend on two circumstances:

- (i) Is the unit of employees whose representation request certification appropriate as a bargaining unit? or, put in another way, do the employees in the unit have sufficiently strong common interests to make it feasible for them to bargain collectively?
- (ii) Do a majority of the employees in the unit wish the bargaining agent to represent them in dealings with the employer or employers?

The Federal Act gives the Labour Relations Board wide power in the certification of trade unions. If the Board is satisfied that a majority of employees in the unit are members of the union or that the majority has indicated by a vote that they wish the union to act as bargaining agent in their behalf, the Board may certify the union. If a bargaining agent representing employees of two or more employers applies for certification such certification can be made if each employer affected consents and if the Board is satisfied that the normal conditions governing certification apply to the workers of each employer. The Manitoba Legislation is identical with that of the Federal Government and that of Nova Scotia has the same provisions in somewhat different words.

The New Brunswick law provides for certification of a bargaining

agent on the same terms as the Federal enactment except that where a union or unions apply for certification the consent of each employer affected is not required but merely that the majority of workers affected of each employer have signified that they wish such bargaining agents to act on their behalf.

The Quebec legislation provides that the Provincial Labour Relations Board can, in deciding whether an application for certification shall be granted, require a secret ballot of any specified employees if the Board is of the opinion that "constraint" has been used to force a number of them to join or to refrain from joining a trade association or that the employees are members of more than one association in sufficient numbers to affect their decision.

The Ontario Labour Relations Act of 1950 provides that, if the Labour Relations Board, in examining the records of a unit deemed suitable for collective bargaining, finds that 45 to 55 per cent of the members of the unit are members of the union applying for certification a vote of employees in the unit is compulsory. Where such a vote is taken the Board must certify the Union if it obtains the votes of more than 50 per cent of those eligible to vote, providing that those who are absent during working hours and thus do not cast their ballots will not be counted as eligible voters. Where the Board finds that more than 55 per cent of the members of a unit are union members certification may be granted without a vote. Furthermore, if the Board should decide that over 50 per cent of the members of the unit belong to the trade union, and that the true wishes of the workers are not likely to be disclosed by a vote, certification without balloting may take place.

The Saskatchewan legislation confers upon the Provincial Labour Relations Board the power to certify a union as a bargaining agent without a vote, although a vote of all eligible employees may be taken by the Board

It is further provided that a secret vote shall be taken upon the application of any trade union which 25 per cent or more of the employees have indicated, within six months preceding the application, as their choice of bargaining agent by membership or written authorization. The Board may refuse such a ballot if it is convinced that another union represents a clear majority of the employees in the unit. If a vote is held, a majority of the workers eligible to vote constitutes a quorum, and if a majority of those voting cast their ballots for the union it shall be taken to represent the majority of employees for purposes of collective bargaining.

The Alberta Labour Relations Board has the power to certify a union as a bargaining agent only if such application has been preceded by a vote of the employees in the unit. Those eligible to cast ballots are:

- (i) Any employee who has been a member in good standing of the trade union for three months prior to the vote;
- (ii) Any employee who has been engaged in his class of employment in the industry at least three months prior to the vote.

The bargaining agent must have received the ballots of a majority of those entitled to vote before it will be certified.

The provisions of the British Columbia legislation are in effect the same as those of the Federal Act except that in the former it is enacted that where an application for certification is made by a labour organization representing the employees of two or more employers the application shall not be granted unless the majority of employers have consented to bargain with the bargaining agent.

A satisfactory certification procedure would include the following elements:

- (i) A provision that a bargaining agent representing the employees of two or more employers could be certified if the appropriate Board was satisfied that the majority of the employees of each

employer so desired, regardless of the wishes of any employer.

- (ii) The provision that if a vote is taken, a majority of those voting should be considered a quorum and that if a majority of those who vote cast their ballots for the trade union it should be certified as bargaining agent.

Under any conceivable certification provisions, the certifying board will have a wide degree of discretion in determining in particular cases what is the proper unit for collective bargaining. It would seem almost inevitable that strong proponents of industrial or craft unionism will criticize the decisions of Boards in particular instances. The best that can be expected, however, is that the administrative authority will approach the disputable cases in a pragmatic way, considering in each instance the history of bargaining in the unit, the structure of the industry and other relevant factors to determine what bargaining unit will best further the interest of workers, employers and the public.

The collective bargaining legislation enacted by the Federal Parliament and the Legislatures of Nova Scotia, Manitoba, Ontario, New Brunswick, Saskatchewan and British Columbia provides for the decertification of previously certified bargaining agents. The Federal Act and those of Nova Scotia and New Brunswick provide that the respective Labour Relations Boards may de-certify any union which has ceased to represent the majority of employees in a particular unit, providing that such bargaining agent has the privilege of applying for re-certification under the regular procedures. The New Brunswick enactment provides that after ten months of the term of collective agreement under the Act the employees affected may apply for the certification of new bargaining agents and that this new application shall be dealt with as if it were an initial application for certification. The Saskatchewan Act states simply that the Labour Relations Board may amend or rescind any order it has previously made. The British Columbia law makes it possible for the Board to de-certify a bargaining

agent at anytime if it is found after investigation that the union has ceased to be a labour organization or that the employer has ceased to employ the workers in the unit. In other cases the Board can revoke certification only after at least a ten month period has elapsed since it was given if the Board becomes satisfied that the agent does not represent the majority of employees in the unit. The Ontario Labour Relations Act of 1950 has the most elaborate provisions for the revocation of certification of bargaining agents which may take place under the following conditions:

- (i) If a union does not enter into an agreement with the employer within a year after it is certified, any of the employees in the unit may apply to the Board for decertification;
- (ii) After an agreement has been in effect for 10 months any of the employees in the unit may apply to the Board for decertification. In both this case and in (1) in order to obtain a declaration terminating certification the employees must signify in writing that they no longer wish to be represented by the trade union, after which the Board must take a representative vote. If more than 50per cent of the workers eligible to vote cast their ballots against the union, the Board must de-certify it;
- (iii) Under certain conditions a union may be de-certified if it fails to give the employer notice of wishing to bargain collectively or if the union refuses to bargain collectively.

In general, reasonably complete legislative provisions relating to the de-certification of bargaining agents seem preferable to leaving the Board wide powers of discretion. This is one situation in which the effective actions of Boards is not hampered by a curtailment of their discretionary powers.

4. Conciliation Procedure

Conciliation (or mediation) has been defined as "a form of industrial diplomacy without resort to public pressure"¹. In the Federal legislation and in the enactments of all the Provinces except Prince Edward Island there are provisions for the use of conciliation in industrial disputes. Conciliation in Canada has two meanings:

- (i) The conciliation in a dispute by an official appointed by the Department of Labour;
- (ii) Conciliation by boards, usually composed of one representative of each party to the dispute and a chairman who is agreed upon by both parties or, in default, appointed by the Minister.

The Industrial Relations and Disputes Investigation Act provides that where a notice to begin collective bargaining has been given as under the terms of the Act and bargaining has not commenced or where bargaining is in process and either party so requests, the Minister may instruct one or more Conciliation Officers to confer with the parties. If the Conciliation Officer fails to bring about an agreement within 14 days, or such longer period as the Minister allows, he must make a report on the state of negotiations to the Minister who may appoint a Conciliation Board. The Minister, if he so decides, may require that each party within seven days of receiving the Minister's notice appoint a member to the Conciliation Board. If either or both parties do not do so the Minister appoints members. The two members thus chosen are required to meet within five days after the second is appointed to nominate a person to be the third party and chairman of the Board. If this proves impossible, the chairman is appointed directly by the Minister. No person who has any pecuniary interest in matters referred to the Board or who has acted within the past six months as "solicitor, legal advisor, counsel, or paid agent of either party" can be a member of the

Conciliation Board. Within 14 days after the appointment of the chairman, or such longer time as the Minister allows, the Board must report its findings and recommendations to the Minister, who sends a copy of such report to be published. No strike or lockout can lawfully take place till seven days after the report has been received by the Minister,

The legislation of Manitoba and Nova Scotia and Ontario is identical with the Federal enactment. That of New Brunswick is the same except that the authority of the Minister to appoint Conciliation Officers and Conciliation Boards is mandatory rather than permissive.

The Quebec Trades Disputes Act provides that the Lieutenant-Governor in Council may appoint a Registrar of Councils of Conciliation and Arbitration, one of whose duties it is to enquire into any industrial dispute which has come to his notice within the Province and to take such steps as he deems expedient to bring about a settlement. If one party to a dispute so requests, a Conciliation Council is constituted of two representatives appointed by each party. If one party fails to nominate its members within six days after receiving notification from the Registrar that the other party has chosen its representatives, the Registrar chooses the representatives of the delinquent party. No limit is put on the time within which the Council must conclude its activities but when it does so it must report to the Registrar who sends a copy of the report to each party.

The Saskatchewan Trade Union Act confers unlimited discretion upon the Minister to appoint Conciliation Boards at such times and of such membership as he sees fit.

Alberta legislation provides for the appointment by the Minister of a Conciliation Commissioner upon the application of either party to an industrial dispute if the Minister feels the dispute to be a proper one for reference to a conciliator. At the same time or subsequently the Minister can refer to the Commissioner other disputes of a similar nature

between other employers and their employees. The Commissioner must report to the Minister within 14 days of his appointment except in cases where the parties to the dispute unanimously consent that the time for the transmission of the report be extended beyond 14 days.

The British Columbia Industrial Conciliation and Arbitration Act provides that where bargaining has been in progress ten days either party can request the Labour Relations Board to instruct a Conciliation Officer to confer with the parties. The Board may accede to or refuse the request or it may appoint a Conciliation Officer in any dispute at its own discretion. The Officer so appointed is given 10 days to complete his duties, although this time may be extended upon agreement by both parties or by direction of the Board. If the Conciliation Officer fails to bring about an agreement a Conciliation Board is appointed under almost identical terms as that in the Federal enactment.¹ The Act provides an alternative procedure by which the parties to a dispute can, at any time before a Conciliation Board is appointed, agree to refer the dispute to a Mediation Committee of their own choosing and that such a Committee shall except for the payment of its Chairman by the Government, be considered as a Conciliation Board. No strike can lawfully take place until after a vote has been taken after conciliation proceedings are completed and a majority of workers affected have declared themselves in favour of the strike.

The potential role of the trained government conciliation officer in effecting settlements of industrial disputes cannot be over-estimated. If he can keep the parties at the bargaining table, he may be able to keep discussion down to the actual problems of the dispute and eliminate rancorous arguments about side-issues or general principles. He may find it possible to find new areas of agreement and to narrow down and define the areas of disagreement. If he can secure the confidence of

1. infra. pp. 130-131.

both parties he may be able by consultation with each separately to find in what ways each will compromise. The development of a skilled conciliation service should have the first priority in every Labour Department.

Representative Conciliation Boards have also an important part to play in furthering industrial peace. Ideally the appointed representatives will be able persons who have the confidence of those who have appointed them but who have no direct pecuniary interest in the dispute and who may be able to lead discussions between the parties into calmer waters. Conciliation Officers and Conciliation Boards have, under adequate legislation, important parts to play in the settlement of labour disputes.

5. Arbitration in Labour Disputes in Quebec and Alberta

Arbitration procedures are used in two ways in the settlement of labour disputes in Canada. In the first, which will be discussed in this section, arbitration boards are appointed, usually after conciliation has failed to bring about an agreement in a particular dispute, but the awards of such boards are not legally binding on workers or employers unless either or both so desire. "Compulsory arbitration" which will be dealt with in some detail in a later section ¹ involves the arbitration board's award being made binding all parties to a dispute whether they wish it or not.

The Quebec Trades Disputes Act provides that either party to a dispute which a Conciliation Board has ~~filed~~ failed to settle may apply to the Registrar of Councils of Conciliation or Arbitration for the appointment of an Arbitration Board or both parties to a dispute which has not been referred to a Conciliation Board may similarly apply for arbitration. The Arbitration Board is constituted of one representative of each party and a neutral chairman agreed upon by these representatives. In default, the Minister appoints representatives of either party or a chairman, the latter to be "an experienced impartial person not personally connected with or interested in any trade or industry, or likely by reason of his occupation business vocation, or other influence, to be biased in favour of or against employers or employees." The Board has almost unlimited discretion in making its award according to "equity and good conscience" except that in any case involving a local government the Board must take into account the financial position of the municipal or school corporation, its capacity to meet the additional financial obligations resulting from the award and the present tax burden on the ratepayers. In the case of a local government any interested party can appeal an award to the Quebec Municipal Commission

1. infra pp. 142-151

on the grounds that the Board has not sufficiently considered the stipulations outlined above and the Commission has power to annul or amend the award and there is no appeal from its decision. No time limit is imposed upon the Board in making its award. The meetings of the Board are public except when one of its own members or a representative of either party requests otherwise. If both parties agree in writing to be bound by the award either before or after it is made the conditions of the award become legally binding upon them.

The Alberta Labour Act requires the Minister to appoint a Board of Arbitration if a Conciliation Commissioner has failed to bring about a settlement in a particular dispute. The members of the Board are appointed in the same manner as in Quebec except that the Lieutenant-Governor in Council rather than the Minister appoints the chairman if the other members fail to agree on a choice for this position. A time limit of 14 days after the Board is constituted is imposed for making the award. The question of acceptance or rejection of the award must be submitted to a separate vote of employees directly affected by it and of employers (where more than one is involved). The vote is to be held when the Minister so directs and may be supervised by the Board of Industrial Relations. A deciding majority of employees is a majority of those eligible to vote and the test of such eligibility is the same as that eligible to vote for a bargaining agent.¹ Strikes and lockouts are prohibited until 14 days after such voting has been completed.

The legislation outlined above is, I believe, unfortunate:

- (i) It imposes unnecessary delays in the settlement of labour disputes, particularly in the Quebec enactment which sets no time limit for the handing down of an arbitration award. Delays may mean that new areas of agreement will be found by the parties and a "cooling off" period may provide time for moderation

1. infra p. 127

to develop but a long period may mean that grievances will be exacerbated. Disputes which remain unsettled generally weigh more heavily on workers than on their employers and being forced to work for unnecessarily long periods of time under conditions which appear unsatisfactory may well lead to increasing intransigence. Labour's ultimate weapon has been blunted by unions not being able to "time" a strike and there is no justification for introducing a further element of unpredictability into the calculation as to when a legal strike can be called;

(ii) The party which refuses to accept an arbitration award is made to appear intransigent in the eyes of the public, perhaps unjustifiably. Any arbitration tribunal is faced with the problem of framing and applying fair and equitable standards to the dispute under consideration.¹ By their very nature these standards are subjective and there is little reason for a situation to be created in which either or both parties feel a certain pressure from the community to accept a particular award;

(iii) Arbitration often frustrates honest, direct collective bargaining. I have personally observed disputes involving Alberta teachers and school boards in which one party was determined to "let the matter go to arbitration" and treated the regular bargaining and conciliation procedures as formalities. In some of these disputes teachers have used the delays created by arbitration as a pressure on their employers, knowing that school boards find it difficult to hire personnel or frame a fiscal policy if they did not know what salary schedule would be in effect in the forthcoming year. There can be little justification for creating situations in which such uncertainties can be used to the advantage of one party or the other.

1. *infra* pp. 148-149.

6. The Collective Agreement

The Federal Industrial Relations and Disputes Investigation Act and the collective bargaining enactments of all the Provinces except Prince Edward Island contain clauses regulating the terms of collective agreements between employer and employees.

(i) The terms of the agreement - The Federal Act and the enactments of Nova Scotia, New Brunswick, Manitoba, Alberta and British Columbia provide that no collective agreement shall be deemed as having been made for less than one year. Contrariwise, the Saskatchewan and Quebec legislation provides that no agreement shall be made for more than one year, although each provides for renewal without negotiation if both parties so consent.

(ii) Provisions for the settlement of questions arising from the interpretation of an agreement - The Federal Act and those of all the Provinces except Prince Edward Island and Saskatchewan and Quebec provide that every collective agreement must contain provisions for final settlement without work stoppage of any dispute concerning interpretation or violation of the agreement. In each case if the agreement does not contain such clauses the Labour Relations Board must, on the application of either party, prescribe procedures for the settlement of disputes without work stoppages.

(iii) The Ontario Labour Relations Act of 1950 declares that any agreement discriminating against any person because of his race or creed is invalid.

7. The Administration of Collective Bargaining Legislation

There exists in the Federal Government a Department of Labour and each of the Provinces except Alberta and Prince Edward Island has its separate labour portfolio. In Alberta labour legislation is administered by the Department of Trade and Industry which has widespread jurisdiction over other matters relating to economic regulations and development. Furthermore, the Federal Government and all the Provinces except Prince Edward Island have appointed administrative boards to administer collective bargaining and, in some cases, other labour legislation.

A Labour Relations Board of a maximum of eight members who hold offices at the pleasure of the Governor in Council administers the Federal Industrial Relations and Disputes Investigation Act. The Board has powers to issue orders which have effect upon publication in the Canada Gazette. The Board also determines certain questions of procedure such as whether an agreement is in force, whether a person is a member of a trade union, whether a group of employees is a unit appropriate for collective bargaining etc. and in these matters its decision is not reviewable by any court or other agency. The Act further provides that no prosecution for violation of any of its terms shall be made except with the consent of the Minister.

The New Brunswick Labour Relations Board consists of a chairman and at least two other members and wields powers similar to those of the Federal administrative agency. The New Brunswick legislation differs from that of the Federal Government in that it declares that prosecutions for offences under the Act shall be made only with the consent of the Board rather than the Minister. The Nova Scotia Board of a chairman and two or more members has analogous functions.

Manitoba legislation confers upon the Labour Relations Board the authority to administer any labour legislation that the Legislature shall direct.

The Board consists of three or more members appointed by the Governor in Council and has powers in relation to collective bargaining analogous to that of the Federal Board. No prosecution under the Labour Relations Act can be made without the consent in writing of the Board.

The Ontario Labour Relations Board consists of a chairman and two or four other members to administer the Labour Relations Act. No prosecutions under the Act can be made without consent of the Board.

The Quebec Labour Relations Board consists of a chairman, a vice-chairman and three other members appointed by the Governor in Council. The Board has the ordinary duties of certification and has the power to dissolve any association of employers which has tried to dominate or hinder the formation of a trade union and any employees' organization which has tried to dominate or hinder the formation of an employers' association. There is no provision in the Act forbidding review of decisions or regulations of the Board by the courts. Prosecutions for offences under the Act can take place only with the consent of the Board or the Attorney-General.

The Saskatchewan Labour Relations Board differs from its counterparts in other parts of Canada in that it includes equal representation of organized employers and employees.¹ The Lieutenant-Governor in Council may appoint equal representation from the general public. As well as holding the same powers as Boards in other Provinces, the Saskatchewan Board has the further authority to require an employer to bargain collectively, to reinstate with compensation an employee discharged contrary to the Act and to disestablish a company-dominated union. It is further provided that the Lieutenant-Governor in Council may, if any employer has wilfully neglected or disobeyed an order of the Board, appoint a controller to operate such business in the name of the Crown until the Lieutenant-Governor in Council is satisfied that upon return of the plant or premises the order of the Board will be obeyed. There is no appeal from an order
1. as does the Ontario Act of 1950

or decision of the Board and it has full power to decide any question of fact "necessary to its jurisdiction". It is specifically provided that no certiorari, mandamus, prohibition or injunction of any court of law can make the Board's actions reviewable.¹ It is almost superfluous to condemn this vicious clause which airily brushes aside the traditional rights of the citizen under the "rule of law".²

The Alberta Board of Industrial Relations has wide powers in the administration of the industrial standards legislation as well as the collective bargaining enactments of the Province. It consists of a maximum of five members appointed by the Lieutenant-Governor in Council. Disputes are referred to the Board for settlement only if the Minister so deems wise. Prosecutions under the Act can take place only with the consent of the Minister.

The British Columbia Labour Relations Board consists of a Chairman, a vice-chairman and such other members as the Lieutenant-Governor in Council deems necessary. Besides the same powers that are wielded by the Federal Board, the British Columbia agency may issue orders to any employer or labour organization to desist from certain unfair labour practices. No prosecution under the Act may be made without the permission of the Board.

Certain basic principles emerge regarding the administration of collective bargaining legislation:

- (i) The Board should be confined in its activities to the administration of collective bargaining legislation and should have no duties involving other enactments. There is little justification for having civil servants dealing with industrial relations on a part-time basis.

1. Often courts will review or prohibit certain actions of administrative agencies if such actions are clearly outside the jurisdiction of such agencies or are contrary to "natural justice."
2. Since this thesis was completed the "Gale Decision" has been reported, which decision would lead one to doubt the efficacy of even the most explicit non-certiorari clauses in labour legislation Ontario Supreme Court Quashes Certification - Labour Gazette - July, 1951 - pp.932-939

- (ii) The Board rather than the Minister should have the power to give permission for prosecutions under the Labour Relations Acts. So far as is possible, this kind of decision should be made by a person or agency which is not under direct political pressure.
- (iii) Members of the Board should be chosen so far as is feasible from among these who have no direct interest in or biases for or against labour or management groups. The Saskatchewan legislation presumes a certain tug-of-war situation within the Board itself. There seems no reason to believe that this kind of Board will make the maximum contribution to industrial peace.

C. Compulsory Arbitration of Labour Disputes.

The alternative to the determination of wages, hours of labour and other working conditions by the processes of collective bargaining is compulsory arbitration by which the parties to an industrial dispute are required to submit it to an outside person or board for a final and binding decision. Compulsory arbitration is not entirely new to Canadians. Such provisions were widely discussed in relation to railway labour disputes and finally rejected by the passage of the Railway Labour Disputes Act of 1903.¹ The Public Services Employees Disputes Act² enacted by the Quebec Legislature in 1944 provides for compulsory arbitration of disputes involving local government employees and employees engaged in transportation communication gas, water and electricity industries. The Federal Government also resorted to compulsory arbitration on an ad hoc basis in the dispute involving the railways in 1950.³ Compulsory arbitration procedures have been enacted in several other democratic nations. New Zealand pioneered in this field in the Industrial Conciliation and Arbitration Act of 1894. Australia followed ten years later by the enactment of the Conciliation and Arbitration Act by the Commonwealth Government and the States have followed with similar legislation. Kansas in 1920 brought into existence a Court of Industrial Relations which had the power to enforce its awards in industries deemed fundamental to the general welfare.⁴ New Jersey in 1947 enacted compulsory arbitration legislation pertaining to labour disputes in utilities operating under government franchise if a work stoppage will, in the Governor's opinion, threaten the public interest, health and welfare. France enacted compulsory arbitration legis-

1. *infra* pp. 92-93

2. Statutes of Quebec, 1944 C. 31

3. *infra* pp. 144-148

4. Labor Problems - G.S. Watkins and P.A. Dodd, 3rd edition New York, 1946 pp. 858-861. A Supreme Court decision in 1925 declared unconstitutional the application of wage-fixing to industries which were not public utilities as being in contravention of the "due process" clause of the Fourteenth Amendment. After 1925 the compulsory arbitration features of the legislation lapsed.

5. Labor and Industrial Relations R.A. Lester - New York - 1951 pp. 341-342

lation in 1936 and war-time legislation still in effect in Britain provides for the settlement of certain disputes by the National Arbitration Tribunal whose awards are legally binding on both parties.¹

It is instructive to consider in some detail the experience of New Zealand under the compulsory arbitration procedures of the Industrial Conciliation and Arbitration Act. Under the Act a registered union can demand that its claims be heard before a Conciliation Council. All employers in the industry and administrative district to which the dispute relates are deemed to be respondents in the action. Issues which are not settled by the Conciliation Council are forwarded for consideration to the Court of Arbitration which consists of a Judge, who has the same status and tenure as a Judge of the Supreme Court, and two other members who are nominated for three-year terms. Proceedings of the Court are much the same as in the other courts although no barrister or solicitor may appear for either party. An award of the Court is non-reviewable and binds not only the original parties to the dispute but also every union of employers or workers and every employer who is engaged in the industry in the district to which it relates and every worker employed by them. The Court has power, however, to extend or limit the scope of the agreement almost at liberty within the industry and to extend it to cover other industrial disputes in which employers manufacture goods entering into competition with those made where the award is in force. The awards are enforced by Inspectors of Factories and of Mines and the Arbitration Court has power to deal with offences under the Act by fine.

A full and sympathetic account of the workings of compulsory arbitration in New Zealand reveals the following effects of the system:

(i) Insofar as the settlement of a dispute is imposed on the parties

by law it does not encourage goodwill between them. Dr. Hare states;

1. Britain 1950-51 Central Office of Information, London, p. 170
2. Industrial Relations in New Zealand - A.E.C. Hare-Wellington, 1946- pp.212-240

"A legally imposed settlement is in reality no settlement, but simply an armed truce imposed by superior force, in which at every opportunity the struggle will break out afresh."

(ii) It appears that the compulsory arbitration process has inhibited the growth of strong trade union movement;

(iii) The settlement of disputes through what Canadians regard as the normal collective bargaining procedures without reference to Conciliation and Arbitration Councils is infrequent;

(iv) The legislation has introduced legalism and bitterness into labour relations. In most cases it seems that employers' and workers' representatives will not deal with each other except through the formal channels of Arbitration and Council Councils. Also because awards are imposed by force of law "they are not regarded as voluntary treaties to be honourably kept" and all parties are inclined to find every loop-hole they can in the hope that the Court will find in their favour and thus establish a precedent.

(iv) Compulsory arbitration in Australia and New Zealand has not brought industrial peace. Between 1927 and 1950 strikes caused a loss of work days per 1,000 persons considerably greater than that in the United States. Rather obviously it is impossible to imprison several hundreds of workers engaged in an illegal strike and in general governments have refrained from enforcing the penalties against such strikes.¹

Compulsory arbitration became a live issue in Canada in connection with the nation-wide railway strike beginning August 22, 1950.² On that date the last of a series of attempts to mediate the differences between two groups of labour organizations representing some 125,000 non-operating

1. Industrial Relations - Lester pp. 335-336.

2. For a full account of the strike and the Maintenance of Railway Operation Act see the Labour Gazette of October, 1950 pp. 1638-1654

railway employees and the management of the principal Canadian railroads failed to resolve their dispute over the demands of the employees for a five-day, 40-hour week and other concessions and over proposals of the employers for a revision in working rules in order to facilitate a "fair and economical" introduction of a shorter work week. Bargaining between the unions and the railways had gone on intermittently since June, 1949.

On August 16, 1950, when a strike appeared imminent, the Prime Minister on behalf of the Government of Canada appealed to both parties to postpone the strike for 30 days. Upon the refusal of the unions to postpone the strike deadline, Dr. W.A. Mackintosh, Vice-Principal of Queen's University and one of the nation's foremost economists, was appointed by the Minister of Labour as special Commissioner to mediate the dispute. The Commissioner's activities between August 19 and August 22 succeeded only in formalizing "points which had been tentatively and conditionally accepted at earlier stages"¹ and on the latter date the strike commenced.

On the same day the work stoppage began the Prime Minister announced that Parliament was being summoned as quickly as possible to deal with the serious emergency created by the strike. On August 29 the Prime Minister introduced into the House a Bill entitled "An Act to provide for the Resumption of Operations of Railways and for the Settlement of the Existing Dispute.....between Railway Companies and their Employees."

By suspension of the standing orders of the House and by night sittings the Bill was rushed through the Commons and the Senate and received Royal Assent late on the evening of August 30. Immediately the leaders of the unions used every means of modern communication available to order the railway employees back to work and within 24 hours normal services had resumed.

In the Commons debates on the Government bill, conducted by all part-

1. Text of Dr. Mackintosh's report to the Minister of Labour
Quoted op. cit. p. 1643

ies on a reasonable and constructive level somewhat remarkable in the light of the acute situation which had developed, there was basic agreement on two points:

- (i) That the Federal Parliament had a definite responsibility to the Canadian people to see that railway service was resumed without delay;
- (ii) That the measures of compulsory arbitration framed to achieve the above purpose should not be considered to have set a precedent in future labour disputes. The Prime Minister by a somewhat ingenious juggling of phraseology denied that the Bill involved compulsory arbitration at all but added "that it is the only way we can find....to restore the normal functioning of Canada's transport system".¹ David Croll, a Liberal Member who was formerly Minister of Labour in the Ontario Government, opposed the Bill in the fear that the compulsory arbitration principle might be applied in the future to strikes involving other industries deemed essential to the public. In general, C.C.F. Members who spoke in the debate shared Mr. Croll's apprehensions.

The Maintenance of Railway Operation Act as enacted contained the following major provisions:

- (i) Within 48 hours all railway services suspended by the strike were to be resumed.
- (ii) The collective agreements then in force were to be revised by a four cent per hour increase in all wages.
- (iii) If within 30 days after the Act came into effect the parties had not settled the dispute, an arbitrator was to be appointed to decide all points at issue which he felt were necessary for the conclusion of a collective agreement, including fixing of

1. House of Commons Debates - 1950 (Second Session) p. 14

a term during which the collective agreement should operate.

- (iv) The arbitrator was required to decide any matter in dispute within the limits of disagreement between the parties when negotiations between them were terminated.
- (v) The arbitrator's award was to be binding upon all parties, although no legal barrier was erected to prevent the alteration or amendment of such award by all parties.

Two observations can be made about this legislation:

- (i) There was no special machinery set up to ensure the enforcement of the provisions of the Act. Mr. Drew and his Progressive-Conservative colleagues had suggested an amendment to the Bill which have provided for the appointment of a national administrator to ensure immediate resumption of railway services pending final solution of the dispute by free collective bargaining. This amendment was negatived by a vote of 186-56.
- (ii) The arbitrator was given the authority to make his award only within the limits of disagreements between the parties when negotiations broke down. The Bill as first introduced by the Government would have made it possible for the arbitrator to deal with any matters involving the relations of the companies and the railway workers. Mr. Coldwell, the C.C.F. leader, was particularly afraid that the working rules which had been hammered out through many years of negotiations would become matters of dispute if the arbitrator's discretion were unlimited. As it was, the area of disagreement when negotiations were broken off was a relatively narrow one.

Mr. Justice Kellock of the Supreme Court of Canada was appointed arbitrator under the Act on Oct. 17, 1950 and made his award on Dec. 18, 1950. It is not necessary to go into the details of the award here.

Compulsory arbitration of industrial disputes is an unsatisfactory policy for the following reasons:

- (i) It deprives unions of their ultimate weapon, the strike, and strips management of its essential functions.
- (ii) It inhibits the growth of free trade unions. At best, trade unions are somewhat more than merely pressure groups but rather organizations through which free men can feel that they can control their economic destiny.
- (iii) It produces attitude of legalism in industrial relations and inhibits the development of confidence between labour and management.
- (iv) It leads to the accumulation of unadjusted differences which may be solved more easily as they arise through direct negotiations. Arbitration, like other forms of litigation, is inevitably a protracted process and grievances remain for months and even years before they are settled.
- (v) It brings into industrial relations those who have no first-hand familiarity with the particular industry involved. Modern industry has become too complex to expect the layman to make intelligent and practical awards in labour disputes.
- (vi) It has proven almost impossible to enforce the awards against unions.
- (vii) It imposes upon the arbitrator the task of making awards which are almost of necessity based upon his own predilections about society. The Quebec legislation requires the arbitrator to make his award "according to equity and good conscience"¹ - per-

haps a reflection of Catholic doctrine of the just wage which

1. Revised Statutes of Quebec, 1925, C.97, S.24

is, unfortunately, difficult to translate into quantitative terms. Management has in many cases resisted compulsory arbitration because it has feared that it might lead to a definition of "reasonable" profits for industry and thereby lay the foundation for government wage and price control.¹ Workers fear that arbitrators, who will usually be members of the judiciary, have backgrounds and experiences which make them unable to appreciate the legitimate demands of labour. Only bitterness can result from awards which must inevitably reflect personal opinions of individual arbitrators or boards as to the relative weight that should be given to the interests of labour, management, shareholders and the organized community in particular disputes;

(viii) It introduces undesirable elements of rigidity into the economy.

As compulsory arbitration has never received serious consideration in peace-time Canada except in connection with industries whose continuous operation is vital to the national welfare this aspect will not be considered. It might be said in passing, however, that in an expanding economy any device which decreases the mobility of the factors of production by introducing rigidities into the wage structure is in most cases unwise.

If we rule out compulsory arbitration as a method of settling labour disputes in those industries whose continuous operation is vital to the national welfare we are forced to choose some other alternative. The Taft-Hartley Act of 1947 provides that where, in the President's opinion, a threatened or actual strike or lockout will imperil the national health or safety, he may appoint a board of inquiry to report the facts of the

1. Requirements of a National Labour Policy - Ludwig Teiler
Annals of the American Academy of Political and Social Science p. 180
 Nov. 1946 p. 180

dispute to him without recommendations. Upon receipt of the board's report the President may direct the Attorney-General to seek a court injunction to enjoin such strike or lockout. If the injunction is issued, the board is reconvened and if the dispute continues, must report again to the President at the end of 60 days indicating a statement of the employer's last offer. Within the succeeding 20 days a secret ballot is taken of the employees on the employer's last offer. Thereupon the injunction must be dissolved and the strike is legal.

The Taft-Hartley Act provisions relating to disputes in vital industries do not provide an adequate solution. Provision for a ballot on the employer's last offer does not promote adjustment of the dispute but rather places additional obstacles in the way of settlement. Workers are unlikely to repudiate their negotiators by accepting the employer's last offer. Anticipating that the unions are likely to consider a refusal to accept the offer as a mandate from the rank and file to ask for more favourable terms, employers may be expected to keep in reserve the concessions that may result in a settlement. I believe that the solution lies in giving the Federal or Provincial cabinets, as the case may be, sufficient power to deal with work stoppages threatening the public welfare by whatever methods may seem appropriate in particular situations. No doubt compulsory arbitration may prove the only possible method of settlement in some cases. However, any legislation which ties the government down to particular procedures may well inhibit collective bargaining and the settlement of the dispute. It is suggested that the Industrial Relations and Disputes Investigation Act and the relevant Provincial enactments be amended to give the Governor in Council the power to seek an injunction forbidding a work stoppage in an industry deemed vital to the public safety for a limited period of time after the normal conciliation procedures are completed. During this period the Government could take whatever measures it considered necessary to avert the strike or lockout, including

compulsory arbitration at the end of such period as a last resort. This somewhat unspectacular compromise is I believe the best that can be suggested.

D. Notes on a Model Labour Code

This final section will attempt to sketch in outline the provisions of a model Labour Code which might be enacted by either the Federal Parliament or any one of the Provincial Legislatures. Apart from the section on Fair Employment Practices, which is inspired by the post-war enactments of several American States, almost every suggested provision can be found somewhere in Canadian labour legislation now in effect.

1. Coverage

All employees should be guaranteed the right to join trade unions and to bargain collectively. However, supervisory employees, guards, policemen and firemen should be restricted to unions comprised solely of members of their own occupation.

2. Unfair Labour Practices.

The following labour practices should be forbidden by law and Labour Relations Boards should have power to issue orders prohibiting the continuation of such practices in specific cases:

- (i) The solicitation of union membership or the carrying on of trade union activities on the employer's premises during working hours without his consent;
- (ii) The failure or refusal to bargain collectively under the terms of the Act;
- (iii) The use of violence or intimidation in labour relations;
- (iv) Discrimination by unions or employers against workers because of their race, creed, national origin or previous trade union affiliation or activity;
- (v) Lockouts and strikes before a dispute has been submitted to conciliation or during the conciliation period;
- (vi) Employer participation in or support of trade unions.

The penalty under (i) should be not more than ten dollars for each offence in the case of an individual and fifty dollars in the case of a trade union. The penalty under (ii), (iii), (v) and (vi) should be a

maximum of one thousand dollars in the case of a labour organization and five thousand dollars in the case of an employer or employers' association. In the case of (iv) the maximum penalty should be one hundred dollars in the case of either a union or employer. The refusal or neglect to obey a specific order of the Board prohibiting unfair labour practices should result in maximum fines of one hundred dollars, one thousand dollars and five thousand dollars for an individual worker, a labour organization or an employer respectively.

3. Certification and De-Certification of Bargaining Agents.

A union should be certified as the sole bargaining agent for a group of employees only after an application accompanied by the returns of a vote on this question has been received by the Labour Relations Board. In such a vote the relevant majority should be the majority of those who actually cast ballots. After ascertaining that the vote was a valid one and that all eligible employees had had the opportunity of voting, the Board would decide whether the employees involved comprised an appropriate unit for collective bargaining and if so the bargaining agent would be certified. A bargaining agent for the employees of two or more employers should be certified if in each employer-unit the above procedure is followed. Any time after ten months following certification have elapsed the employees concerned should have the opportunity to apply to the Board for the revocation of the bargaining agent's certified status by a majority vote of the employees affected. This should be the only condition under which a union is de-certified.

4. Conciliation Procedure

Adequate labour legislation would provide that no strike or lock-out could lawfully take place before the dispute had been submitted to the Minister who would be obligated to refer it to conciliation for settlement. Similarly, no change in the terms or conditions of employment could be made by either workers or employers, except in cases of agreement with

the other party or parties, before the matter had been referred to the Minister. The dispute would first be submitted to a Conciliation Officer and, if no settlement were reached, to a Conciliation Board made up of a representative of each party and a chairman upon whose appointment both were agreed. It is suggested that the Minister have a maximum of three days to submit the dispute to a Conciliation Officer or a Conciliation Board, as the case may be, and that each of these have a maximum period of fourteen days between the time of their appointment and the submission of their report to the Minister. Seven days after the Minister had transmitted the Conciliation Board's report to each party, a strike or lockout should lawfully be allowed to take place. As an alternative to submission of a dispute to a Conciliation Board there should be a provision allowing both parties to submit such dispute to a Mediation Committee upon whose membership both parties agree.

5. The Collective Agreement.

Adequate labour legislation would require the following terms in any agreement concluded under the Act.:

- (i) The agreement must be concluded for a period of neither more or less than one year unless the special permission of the Board is given otherwise. Either party to an agreement would be able to open collective bargaining negotiations only if the agreement had been in effect for a period of at least ten months;
- (ii) An agreement would be invalidated if any clause in it provided for the discrimination in employment of any person because of race, creed, or national origin;
- (iii) All agreements must have a procedure for the final settlement of disputes arising out of interpretation or violation of the agreement without work stoppages. If the agreement does not

include such terms the Board should be required to insert such a procedure in the agreement;

- (iv) At any time during the negotiation period or after an agreement is concluded a majority of the employees in the bargaining unit, whose wishes are ascertained by a secret ballot, should have the power to have inserted in the collective agreement union shop or maintenance of membership provisions.

6. Labour Disputes in Industries and Business Whose Continuous Operation is Vital to the General Welfare

The Governor-General in Council or the Lieutenant-Governor in Council, as the case may be, should be given the authority to order that any actual or impending strike or lockout be postponed for a period of at least thirty days if such work stoppage be deemed to menace the health and safety of the community. During this period the Government would be charged with finding any method possible for settling the dispute including compulsory arbitration.

7. Fair Employment Practices.

The Lieutenant-Governor in Council or the Governor-General in Council should be charged with naming an official as Fair Employment Practices Commissioner. Any report of alleged discrimination by an employer or a trade union on the grounds of race, creed or national origin would be investigated by the Commissioner. If such discrimination were found to exist the individual or organization which had so contravened the law would have fourteen days to comply with the Commissioner's order to cease so doing or be liable to a fine. More severe penalties should be provided for second and subsequent offences.

8. Administration

Collective bargaining legislation should be administered by a Board of the size and composition determined by the Governor-General in

Since this thesis was completed the Ontario Fair Employment Practices Act has been reported which enacts provisions similar to those I have suggested-
Labour Gazette - June 1951-pp. 246-847

Council or the Lieutenant-Governor in Council and should have no other duties. Orders and regulations of the Board should be reviewable by the courts. No prosecution under the Act should take place without the written permission of the Board.

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